Santa Clara University School of Law

Santa Clara Law Review

Volume 24 | Number 1 Article 1

1-1-1984

Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations

Jake Dear

Steven E. Zipperstein

COMPARATIVE FAULT AND INTENTIONAL TORTS: DOCTRINAL BARRIERS AND POLICY CONSIDERATIONS

Jake Dear*
Steven E. Zipperstein**

The whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, and the other restraining and at last overcoming the effort when the results become too manifestly unjust.[1]

I. INTRODUCTION

In order to consider fully the conduct of all parties to a tort action and to allocate liability accordingly, courts recently have extended the application of comparative fault principles. Faced with defendants liable under negligence, recklessness, or strict liability, courts have determined respective liabilities of defendants and plaintiffs, and have reduced plaintiffs' damages in proportion to their liability.

No court, however, has explicitly applied comparative fault principles to intentional torts. This "rule" is supported by social policy considerations against sanctioning, or even appearing to facilitate, self-help—i.e., the taking of the law into one's own hands[2]—by defendant tortfeasors. But what is the rule when the defendant's intentional act is not characterized by self-help? Consider the following hypothetical:[3] plaintiff constructed a drainage outlet running from

---

* Law clerk to Justice Stanley Mosk, Supreme Court of California. Member, California Bar. B.A., 1979; J.D., 1983, University of California, Davis.

** Associate, Hufstedler, Miller, Carlson & Beardsley, Los Angeles, California. Member, California Bar. B.A., 1979, University of California, Los Angeles; J.D., 1983, University of California, Davis.

The authors thank Professor Jean C. Love, U.C. Davis School of Law, for her special insight, assistance and criticism.

1. Holmes, *Agency*, 4 HARV. L. REV. 345, 346 (1891).
2. *See infra* text following note 88.
3. Based on Sandifer Motors, Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 628

his warehouse into a ravine. He negligently installed an outlet with a diameter too small to function properly. Defendant maintained a garbage dump above plaintiff's ravine. Over a course of months, debris from defendant's dump fell down the ravine, blocked plaintiff's outlet, and flooded his warehouse. If plaintiff's drain had been properly constructed, the backup would have been less severe. Plaintiff complained to defendant, and defendant was aware that his debris was periodically falling and blocking plaintiff's drain. One year after defendant first learned of the problem, a large amount of debris again fell and blocked plaintiff's drain, causing damage to plaintiff's property, for which plaintiff now sues.

Most courts faced with this situation would award plaintiff full recovery. Because plaintiff was the victim of an intentional tort—nuisance—and even though he was negligent, the court will likely announce that comparative fault has no application since, it is said, negligence and intentional conduct cannot be compared because they are "different in kind."

This article challenges this traditional result and its rationale. We contend that negligence, recklessness, and intentional conduct—the three traditional classifications of fault—are not different in kind, but merely reflect *degrees* of violation of a common social norm. We further assert that in some intentional tort situations, as in the intentional nuisance discussed above, policy considerations balance in favor of open and express application of comparative fault principles.

Part II discusses the evolution of the current rule against apportioning fault in intentional torts. Part III analyzes theoretical and policy barriers to application of comparative fault in intentional torts. This part dismisses the theory of "different in kind," arguing instead that traditional categorizations of fault reflect a continuum of conduct in violation of a singular social norm. After addressing social policy considerations, this part concludes that comparative fault should not be extended to self-help intentional torts, such as battery, but that policy considerations may militate in favor of applying the doctrine to some non-self-help intentional torts, such as intentional nuisance. Part IV discusses the trend toward comparative fault in recklessness and strict liability actions, the recent application by some courts of comparative fault principles to self-help intentional torts, and recent attempts by courts faced with nuisance actions to apply comparative principles. Finally, Part V analyzes the role of

---

P.2d 239 (1981), discussed *infra* at notes 157-60 and accompanying text.

comparative fault statutes as applied to appropriate non-self-help intentional tort cases.

II. History of the Rule Against Application of Comparative Fault in Cases of Intentional Conduct

A. *Early Admiralty Law: Division of Loss and Intentional Conduct*

The modern rule of apportioning damages in negligence actions has its genesis in the ancient shipping codes of Europe and Britain.[4] The most notable of these are the famous *Rolls of Oleron*,[5] which were eventually incorporated in *The Black Book of The Admiralty*[6] and administered in the admiralty courts as early as 1338.[7] In the sixteenth century, when the High Court of Admiralty was faced for the first time with the issue of damages due to ship collision, it relied

---

4. The first code that mandated apportionment of damages according to fault was the *Consulato del Mare*, written in the mid-fourteenth century. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 222-23 (1950).

5. *Rolls of Oleron*, (twelfth century), *reprinted in* 1 THE BLACK BOOK OF THE ADMIRALTY 88-131 (Twiss ed. 1965) [hereinafter cited as BLACK BOOK OF ADMIRALTY]; *see also* 30 F. Cas. 1171 (1897). Although the origin of the *Rolls* is uncertain, some authorities claim that Richard the First brought them to Britain. E. ROSCOE, THE GROWTH OF ENGLISH LAW, 112-13 (1911); J. SELDON, AN HISTORICAL AND POLITICAL DISCOURSE OF THE LAWS AND GOVERNMENT OF ENGLAND, pt. 2, ch. V, 25 (5th ed. London 1760) (1st ed. London 1688); J. SELDON, MARE CLAUSUM, TRANSLATED, OF THE DOMINION OR OWNERSHIP OF THE SEA, bk. II ch. XXIV, 386-87 (1st ed. London 1652 & photo reprint 1972); Sprague, *Divided Damages*, 6 N.Y.U.L. REV. 15, 15-21 (1928). *Contra* F. SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW, 64 (1930); 1 BLACK BOOK OF ADMIRALTY, xiii n.1 *passim*, Introduction.

6. BLACK BOOK OF ADMIRALTY, *supra* note 5. The book was compiled in the fourteenth century, though its documents are considered of much earlier origin. R. MARSDEN, DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA, 118 (1915-16). *See* discussion of the history of the *Rolls of Oleron* in 4 BLACK BOOK OF ADMIRALTY, vii-lxii. *See generally* Sprague, *supra* note 5; Turk, *supra* note 4; *see also* A. WHITE, OUTLINES OF LEGAL HISTORY 27 (1895); 4 BRITISH SHIPPING LAWS, THE LAW OF COLLISIONS AT SEA (K. McGuffie ed. 1961) [hereinafter cited as BRITISH SHIPPING LAWS]; Huger, *Proportional Damage Rule in Collisions at Sea*, 13 CORNELL L.Q. 531 (1927).

7. W. PRYNNE, BRIEF ANIMADVERSIONS ON AMENDMENTS OF AND ADDITIONAL EXPLANATORY RECORDS TO THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, 110, 117 (London 1669); BRITISH SHIPPING LAWS, *supra* note 6, at 109-10 n.10. F. SANBORN, *supra* note 5 at 70, 265, claims that the codes were used as authority even earlier. The *Rolls* were relied on as authority in Pilk v. Venore (1346), a case widely reported in the literature. 1 BLACK BOOK OF ADMIRALTY, *supra* note 5, at lxi-lxii; 2 R. MARSDEN, SELECT PLEAS IN THE COURT OF ADMIRALTY, xliii (1897) [hereinafter cited as SELECT PLEAS]; W. PRYNNE, *supra* at 117; F. SANBORN, *supra* note 5, at 270. *See generally* R. MARSDEN, A TREATISE ON THE LAW OF COLLISIONS AT SEA (8th ed. 1923) [hereinafter cited as COLLISIONS AT SEA]. The *Rolls* were cited as authority in an inquisition in 1375. E. ROSCOE, *supra* note 5, at 113.

on the *Rolls* and held that loss should be divided equally between the parties.[8] The rule of "division of loss" was later applied in numerous cases throughout the seventeenth and eighteenth centuries.[9]

During this same period, however, the admiralty courts sometimes strayed from the equal division rule, applying it inconsistently[10] and venturing in some cases to apportion damages according to each party's share of the fault.[11] Still, although different damages schemes were applied over the years, one rule was rigidly adhered to: neither apportionment nor equal division applied when a party acted intentionally.[12] According to article XIV of the *Rolls of*

---

8. Handcocke v. Payne (1539), *reprinted in* 1 SELECT PLEAS, *supra* note 7 at 90; *see also id.* lxxii. The division of loss rule is found in the *Rolls of Oleron*, *supra* note 5, art. XIV:

> If a vessel, being moored, lying at anchor, be struck or grappled with another vessel under sail, that is not very well steered, whereby the vessel at anchor is prejudiced, as also wines, or other merchandize in each of the said ships damnified. *In this case the whole damage shall be in common, and be equally divided and appraised half by half; and the master and the mariners of the vessel that struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did it not willingly or wilfully. The reason why this judgment was first given, being, that an old decayed vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided.*

30 F. Cas. 1171, 1178 (1897) (emphasis added).

9. *E.g.*, Kichener v. Cocklin, Burrell, 23 Brit. Mar. Cas. 294 (1706); Nodem v. Ashton, Burrell, 23 Brit. Mar. Cas. 290 (1706); Beckham v. Chapman, Burrell, 23 Brit. Mar. Cas. 270 (1695); Trew v. Peirce, Burrell, 23 Brit. Mar. Cas. 264 (1692); Harper v. Gravenor, Burrell, 23 Brit. Mar. Cas. 251 (1677); Harbyn v. Berry, Burrell, 23 Brit. Mar. Cas. 235 (1648). The rule was applied even when one party was "more at fault than the other," Wildman v. Blakes, Burrell, 23 Brit. Mar. Cas. 332 (1789); *contra* Ann of Mostein, Burrell, 23 Brit. Mar. Cas. 263, 264 (1691) (applying a form of contributory negligence) (*see infra* note 20). Curiously, division was sometimes applied when the defendant alone was at fault. Nelson v. Fawcett, Burrell, 23 Brit. Mar. Cas. 332 (1789); Conwallis v. Noden, File 117 n.145, in 1 SELECT PLEAS, *supra* note 7, at lxxxv.

10. The admiralty courts at times allowed and at other times disallowed division of damages when there was mutual fault. Generally, when only one party was at fault, the entire loss fell on him. Fletham v. Godfrey, Burrell, 23 Brit. Mar. Cas. 298 (1709). When neither party was at fault, the court imposed no damages. Baker v. Malin, Burrell, 23 Brit. Mar. Cas. 322 (1764). But in another case the court allowed division though only the defendant was at fault. Nelson v. Fawcett, Burrell, 23 Brit. Mar. Cas. 332 (1789). *See generally* cases cited in 2 SELECT PLEAS, *supra* note 7, at lxxxiv nn.7 & 8.

11. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 9-10 (1953). In King v. Johnson (1643), discussed in 2 SELECT PLEAS, *supra* note 7, at lxxxiii-iv n.17, the plaintiff proved £1,800 in full damages but was awarded only £400. Partial damages were awarded in another case in 1687. *Id.* Still, equal division remained the general rule until 1911 when Britain conformed to the rule of apportionment under the Brussels Maritime Convention. 4 BRITISH SHIPPING LAWS, *supra* note 6, § 147, at 114 n.38 *and citations*; Mole & Wilson, *A Study of Comparative Negligence*, (pts. 1 & 2) 17 CORNELL L.Q. 333, 604, at 342-45 (1932); Prosser, *supra*, at 10 nn.48 & 49.

12. Harper v. Gravenor, Burrell, 23 Brit. Mar. Cas. 251 (1677); 4 BRITISH SHIPPING LAWS, *supra* note 6, § 141, at 111; 2 SELECT PLEAS, *supra* note 7, at lxxxv n.5.

Oleron, this was necessary to assure that "an old decayed vessel might not purposely be put in the way of a better, which will rather be prevented when they know that the damage must be divided."[13] A commentary to the *Rolls* expanded on the reason behind the rule: "for an old vessel that's worth a little or nothing, might else be put in a new one's way: and if she runs against her, more damages be pretended, than the old ship might fairly be valued at."[14] The same pragmatic rationale was echoed in another authoritative maritime code, the *Laws of Wisby*:[15] "if it was done by the master on purpose . . . he alone shall make satisfaction. The reason is, that some masters who have old crazy ships, may willingly lay in another ship's way, that they may be damnified or sunk, and so have more than they were worth for them."[16]

These ancient codes show that at the earliest times, distinctions were drawn between "accidental" (negligent) collisions, and intentional ones: division of loss applied to the former, but not to the latter. And, although the rule survives today, its rationale has changed. The maritime codes declined to divide or apportion damages in cases of intentional collision, in order to prevent cheating. As discussed below, common law courts, on the other hand, have articulated various explanations for declining to apportion damages in cases in which one party has acted intentionally, and another negligently. Early common law courts seemed more concerned with result than with theory; they distinguished between intentional and negligent conduct in order to circumvent the harsh effect of the contributory negligence bar, and thereby to punish and deter intentional tortfeasors.[17] Modern courts at the turn of the century reached the same result by theorizing that intentional and negligent conduct is "different in kind" and therefore not susceptible to comparison.[18]

---

13. *Rolls of Oleron*, art. XIV, *quoted supra* note 8.

14. "Observation" of *Rolls of Oleron*, art. XIV, *supra* note 8, in 30 F. Cas. 1171, 1178 (1897).

15. *Laws of Wisby*, (thirteenth century), *reprinted in* 4 BLACK BOOK OF ADMIRALTY, *supra* note 5, at 261-84 (also in 30 F. Cas. 1189-95 (1897)). See discussion of the relationship between the *Laws of Wisby*, the *Rolls of Oleron*, and other ancient shipping codes in COLLISIONS AT SEA, *supra* note 7, at 153-55.

16. *Laws of Wisby*, art. XXVI, *reprinted in* 30 F. Cas. 1189, 1191 (1897). Following the intentional conduct rule set out above, the court in Milton v. Maundrell, Burrell, 23 Brit. Mar. Cas. 305, 305-06 (1719), condemned the defendant to pay full damages for his ship having run down the other "willfully."

17. *See infra* notes 19-39 and accompanying text.

18. *See infra* notes 40-46 and accompanying text.

B. *Early Common Law: The Contributory Negligence Doctrine and Intentional Torts*

Early common law courts dealt harshly with plaintiffs who were at fault.[19] The seminal British case of *Butterfield v. Forrester* denied recovery when the plaintiff's negligence contributed to his injuries, on the theory that "one person being at fault will not dispense with another's using ordinary care for himself."[20] Contributory negligence as an absolute defense was well-received in England[21] and the United States,[22] and is today still applied in eight states.[23]

The courts soon recognized, however, that barring recovery to a plaintiff who contributed to his own injury often produced inequitable and harsh results. Thus, limitations were imposed on the use of the contributory negligence doctrine as an absolute defense.[24] Two

---

19. Although division of loss seems indigenous to the admiralty courts, some common law courts did consider apportioning damages based on fault. Early attempts by Illinois and Kansas to mitigate contributory negligence relied on fictional classifications of "gross" and "slight" negligence. These schemes proved unworkable. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 434 nn.56-59 (4th ed. 1971).

20. Butterfield v. Forrester, 11 East 60, 61, 103 Eng. Rep. 926, 927 (1809). This case is said to be the genesis of the contributory negligence doctrine. Turk, *supra* note 4, at 190 nn.2 & 3 (citing authorities); Prosser, *supra* note 11, at 3. But the doctrine was applied before *Butterfield*. Turk, *supra*, at 190 n.8, (and authorities cited); Bohlem, *Contributory Negligence*, in SELECTED ESSAYS ON THE LAW OF TORTS, 469 nn.51-53 (1924). Although it is undisputed that the doctrine developed at common law at the turn of the eighteenth century, there is evidence of the rule in admiralty as early as 1691. In Ann of Mostein, Burrell, 23 Brit. Mar. Cas. 263, 264, the court announced that "the *Charles* [was] in greatest fault, and . . . cannot recover."

21. *E.g.*, Tuff v. Warman, 5 C.B. (n.s.) 573, 141 Eng. Rep. 231 (1857).

22. New York, for example, firmly established the doctrine in the following cases: Tonawanda R.R. v. Munger, 5 Denio 255, 266 (N.Y. Sup. Ct. 1844) (plaintiff who negligently allowed cattle to wander onto railway cannot recover even if railroad company was negligent); Brown v. Maxwell, 6 Hill 592, 593 (N.Y. Sup. Ct. 1844) ("a plaintiff suing for negligence must himself be without fault"); Brownell v. Flagler, 5 Hill 282, 283, and authorities at 283 n.a (N.Y. Sup. Ct. 1843) (if both parties are negligent, neither can recover); Hartfield v. Roper, 21 Wend. 615, 619 (N.Y. Sup. Ct. 1839) ("if there be negligence on the part of the plaintiff there cannot be recovery"); Rathbun & W. v. Payne, 19 Wend. 399, 400-01 (N.Y. Sup. Ct. 1838) ("a plaintiff suing for negligence must be wholly without fault").

23. A plaintiff's contributory negligence bars his recovery in Alabama, Delaware, Indiana, Kentucky, Maryland, North Carolina, South Carolina, and Virginia. H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT, app. (1978 & Supp. 1983); 5 SCHWARTZ, COMPARATIVE NEGLIGENCE (1974 & Supp. 1981).

24. Shrager & Shepherd, *History, Development, and Analysis of the Pennsylvania Comparative Negligence Act: An Overview*, 24 VILL. L. REV. 422, 425 n.22, 429-33 (1978-79) (listing nine "inroads on the defense"); *see also* Prosser, *supra* note 11, at 4-7; Turk, *supra* note 4, at 203-04; Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 751-54 (1976). Legislatures also have recognized the harsh result of contributory negligence, and this has led in part to the development of workers' compensation laws. Mole & Wilson, *supra* note 11, at 606-07; Note, *Intentional*

states introduced a crude form of comparative fault in order to mitigate the use of the defense.[25] Although some states allowed the defense to bar recovery even when the defendant acted recklessly,[26] other states held that the doctrine applied only in cases of mutual negligence.[27] Many courts declined to apply the contributory negligence bar to nuisance actions.[28] Some courts engaged in questionable

---

Employer Torts and Workers' Compensation: A Legal Morass, 11 PAC. L.J. 187, 189 (1979).

25. *See supra* note 19; Fleming, *Foreward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 268 (1976); Goldberg, *Judicial Adoption of Comparative Fault in New Mexico: The Time Is at Hand*, 10 N.M.L. REV. 3, 10-11 (1979-80); Prosser, *supra* note 11, at 17-21; Comment, *Comparative Negligence: Some New Problems for the Maine Courts*, 18 ME. L. REV. 65, 68-69 (1966).

26. Rowen v. New York, 59 Conn. 364, 20 A. 1073 (1890); Neal v. Gillett, 23 Conn. 437 (1855); McDonald v. International & Great N. Ry., 86 Tex. 1, 22 S.W. 939 (1893); International & Great N. Ry. v. Kuehn, 11 Tex. Civ. App. 21, 31 S.W. 322 (1895); Texas & N.O. Ry. v. Brown, 2 Tex. Civ. App. 281, 21 S.W. 424 (1893); *see also* Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824) and 13 Am. Dec. 464, 467 (1824) (authorities approving *Smith*); Bush v. Brainard, 1 Cow. 78 (N.Y. Sup. Ct. 1823).

27. Highland Ave. & Belt R.R. v. Robbins, 124 Ala. 113, 118, 27 So. 422, 425 (1900); Montgomery & Eufaula Ry. v. Stewart, 91 Ala. 421, 424-32, 8 So. 708, 711 (1890) (and authorities cited); Carrington v. Louisville & Nashville Ry., 88 Ala. 472, 477, 6 So. 910, 911 (1889) (citing authorities); Esrey v. Southern Pac. Co., 103 Cal. 541, 544-45, 37 P. 500, 502 (1894); Central R.R. & Banking Co. of Ga. v. Newman, 94 Ga. 560, 21 S.E. 219 (1894); Lafayette & Indianapolis R.R. v. Adams, 26 Ind. 76 (1866); Boggess v. Chesapeake & O. Ry., 37 W. Va. 297, 16 S.E. 525 (1892); Thurman v. Louisville & N. Ry., 17 Ky. L. Rptr. 1343, 1344-45, 34 S.W. 893, 894 (Ky. Ct. App. 1896) (not officially reported). Courts explained this result in various ways: a defendant has a special duty to avoid wanton injury to a plaintiff, Frazer v. South & North Ala. R.R., 81 Ala. 185, 197-200, 1 So. 85, 88-91 (1887); a defendant owes a special duty to children or impaired persons, Battishill v. Humphreys, 6. Mich. 514, 520-21, 38 N.W. 581, 586 (1888); a "wanton" act by the defendant breaks the causal chain, relieving the plaintiff of liability, Government St. R.R. v. Hanlon, 53 Ala. 70, 77 (1875). Courts have noted that the concept of recklessness developed to mitigate the harsh contributory negligence bar. Plyler v. Wheaton Van Lines, 640 F.2d 1091, 1093 (9th Cir. 1981) (interpreting California law). In Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962), the court observed:

> One of the main reasons for the growth of the doctrine of gross negligence was to ameliorate the hardships of the common law doctrine of contributory negligence . . . . [G]ross negligence[,] being defined as different in kind and not in degree, could not be compared to ordinary negligence . . . . Various . . . statutes . . . also influenced the growth of the doctrine . . . to reach the socially desirable result.

Id. at 16, 114 N.W.2d at 112.

28. *See* Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355, 73 A.L.R.2d 1368 (1956), *aff'd*, 7 Wis. 2d 556, 97 N.W.2d 385 (1959). When astute plaintiffs began contorting causes of action in order to fit them under the nuisance umbrella and thus avoid the contributory negligence bar, courts responded by distinguishing between "negligent" and "absolute" nuisances. Contributory negligence was applied to those nuisances characterized by negligence. *See, e.g.*, Terrell v. Alabama Water Serv. Co., 245 Ala. 68, 15 So. 2d 727 (1943); Calder v. City & County of San Francisco, 50 Cal. App. 2d 837, 123 P.2d 897 (1942); Kelly v. Doddy, 115 N.Y. 575, 22 N.E. 1084 (1889).

Application of contributory negligence to cases of "absolute" nuisance (which included

formulations of "direct" and "indirect" causation to avoid invoking the defense,[29] while others reached the same result by characterizing plaintiffs' conduct as not negligent.[30] The contributory negligence defense was not allowed in cases of liability based on statute,[31] nor did it apply when the defendant had the "last clear chance" to avoid the injury.[32] Finally, and most important to the current inquiry, the courts uniformly rejected the contributory negligence defense when the defendant acted intentionally.[33]

The early cases addressing the application of contributory negligence to a defendant's intentional conduct frequently involved plaintiffs who had suffered personal injury at the hands of defendant railways.[34] Although the reason for rejecting the contributory negligence

---

forms of liability greater than mere negligence such as strict liability, intentional conduct, and statutory negligence) was the exception, not the rule. Annot., 73 A.L.R.2d 1378 § 5 (1960). Still, Prosser has noted that:

> [E]ven if the nuisance is a matter of intent, or of some abnormally dangerous activity, the kind of contributory negligence which consists of voluntarily encountering a known danger, and often is called as assumption of risk, may still be a defense. The plaintiff is not free to run recklessly into a known obstruction in the street, skate on a pond from which he knows the ice has been cut, or walk into the midst of visible dynamiting operations, and still hold the defendant responsible for his damages. In such cases there is a consent to take the risk, or such an element of wilful misconduct on the part of the plaintiff that he is barred from recovery in nuisance as in the case of any other tort.

W. PROSSER, *supra* note 19, § 91 at 610 (footnotes omitted). As observed in Annot., 73 A.L.R.2d 1378, 1390 n.11 (1960), "[t]he case often cited as that originating the doctrine of contributory negligence involved a fact situation which could well have been classified as a deliberately created public nuisance, the obstruction of the highway by a pole extended across part of the road." (citing Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 920 (1809)). The general rule, however, was that contributory negligence did not bar recovery for intentional nuisance. *E.g.*, Hoffman v. Bristol, 113 Conn. 386, 155 A. 499, 75 A.L.R. 1191 (1931); Deane v. Johnston, 104 So. 2d 3, 65 A.L.R.2d 957 (Fla. 1958).

29. T. COOLEY ON TORTS, 1444-45 (3d ed. 1906); Prosser, *supra* note 11, at 25-28.

30. Shrager & Shepherd, *supra* note 24, at 426 n.24, observe a trend to let juries decide if contributory negligence has occurred. *See also* Fleming, *supra* note 25, at 272-73.

31. T. SHEARMAN & S. REDFIELD ON THE LAW OF NEGLIGENCE, § 62, at 90-92 (cases cited and nn.2-3) (1898); Prosser, *supra* note 11, at 5-6; Schwartz, *supra* note 24, at 753. *See* Zerby v. Warren, 297 Minn. 134, 138-39, 210 N.W.2d 58, 61-62 (1973) (defendant liable per se for violation of criminal statute designed to protect minor plaintiffs from glue sniffing).

32. Battishill v. Humphreys, 64 Mich. 514, 520-21, 38 N.W. 581, 586 (1888); Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842); Prosser, *supra* note 11, at 6-7 (explaining the reason for the doctrine); Turk, *supra* note 4, at 204-05.

33. Prosser, *supra* note 11, at 4; Schwartz, *supra* note 24, at 752-53; Schrager & Shepherd, *supra* note 24, at 430-31; Turk, *supra* note 4, at 203.

34. Louisville & N. Ry. v. York, 128 Ala. 305, 308-09, 30 So. 676, 677 (1901); Alabama Great S. R.R. v. Frazier, 93 Ala. 45, 47, 9 So. 303, 305 (1891); Tognazzini v. Freeman, 18 Cal. App. 468, 476, 123 P. 540, 544 (1912) (quoting authorities); Florida S. Ry. v. Hirst, 30 Fla. 1, 37, 11 So. 506, 513 (1892); Louisville, N.A. & C. Ry. v. Wurl, 62 Ill. App. 381, 384 (1895); Ruter v. Foy, 46 Iowa 132, 132-33 (1877); Williams v. Railroad, 2 Mich. 259,

defense in these cases was not often expressly articulated, one policy consideration was that intentional tortfeasors should be punished[35] for their conduct by stripping them of the contributory negligence defense. The desire of the common law to avoid aiding the intentional wrongdoer is further exemplified by the longstanding rule against contribution among intentional tortfeasors.[36] Moreover, some courts apparently sought to deal with intentional tortfeasors more firmly in order to deter such future conduct.[37] However, the most clearly articulated policy consideration, frequently expressed in cases of intentional personal injury, was circumvention of the harsh result[38] of the contributory negligence bar.[39] In this way, courts furthered the social policy goal of allowing recovery for physically injured victims of intentional torts.

C. *Modern Common Law: Contributory Negligence, Intentional Torts, and Evolution of the "Different in Kind" Theory*

At the turn of the twentieth century, courts began to articulate a

---

265-66 (1851) (citing authorities); McMahon v. Davidson, 12 Minn. 357 (Gil. 232, 249) (1867) (stating the rule in dictum); Martin v. Wood, 5 N.Y.S. 274, 275 (N.Y. Sup. Ct. 1889); Brownell v. Flagler, 5 Hill 282, 284 (N.Y. Sup. Ct. 1843); Moore v. Atchison, Topeka & Santa Fe Ry., 26 Okl. 682, 693, 110 P. 1059, 1063 (1910); Hawks v. Slusher, 55 Or. 1, 4, 104 P. 883, 885 (1909); Galveston, Harrisburg & San Antonio Ry. v. Zantzinger, 92 Tex. 365, 370-71, 48 S.W. 563, 566 (1898).

35. Bohlem, *supra* note 20, at 491.

36. W. PROSSER, *supra* note 19, § 50, at 305-08 nn.67-69 (4th ed. 1971). *See generally* CAL. CIV. PROC. CODE § 875(d) (West 1980); Rizzo & Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399, 1400-01 (1980); Comment, *Comparative Fault in Intentional Torts*, 12 LOY. L.A. L. REV. 179, 181 & n.14, 195 & n.99 (1978) (discussing Uniform Contribution Among Joint Tortfeasors Act, 1955 Revision). *Contra* Kelly v. Long Island Lighting Col., 31 N.Y.2d 25, 29, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972).

37. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 27-28 (1941).

38. *See* authorities cited at note 24, *supra*.

39. *See, e.g.*, Steinmetz v. Kelly, 72 Ind. 442, 446 (1880): "An intentional assault and unlawful battery, inflicted upon a person, is an invasion of his right of personal security, for which the law gives him redress, and of this redress he can not be deprived on the ground that he was negligent and took no care to avoid such invasion of his right." *See also* Birmingham Ry., Light & Power Co. v. Jones, 146 Ala. 277, 41 So. 146 (1906); Louisville & N. Ry. v. York, 128 Ala. 305, 30 So. 676 (1901); Highland Ave. & B. Ry. v. Robbins, 124 Ala. 113, 27 So. 422 (1900); Louisville & N. Ry. v. Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21 (1894); Louisville & Nashville Ry. v. Hurt, 101 Ala. 34, 47, 13 So. 130, 133 (1893); Montgomery & Eufaula Ry. v. Stewart, 91 Ala. 421, 8 So. 708 (1890); Louisville & N. Ry. v. Watson, 90 Ala. 68, 69, 8 So. 249, 250 (1890); Louisville & Nashville Ry. v. McCoy, 81 Ky. 403, 414 (1883); Christian v. Illinois Cent. Ry., 12 So. 710, 711 (Miss. 1893). The same logic was applied in recklessness cases. *E.g.*, Aiken v. Holyoke Street Ry., 184 Mass. 269, 68 N.E. 238 (1903); Montgomery v. Lansing City Elec. Ry., 103 Mich. 46, 61 N.W. 543 (1894).

more "legalistic" explanation for the policy against allowing contributory negligence to bar a plaintiff's recovery in intentional tort actions. In 1908, the Supreme Court of Kansas announced, without citation to authority, that the inapplicability of contributory negligence to intentional conduct was "based upon a theory of a difference in kind."[40] Apparently uncomfortable resting their decisions on social policy reasons alone (i.e., punishment, deterrence, or circumvention of the contributory negligence bar), other courts soon embraced the different in kind theory. Chief among them was the Supreme Court of Michigan, which rearticulated the theory in *Gibbard v. Cursan*,[41] reasoning that "[i]f one willfully injures another . . . he is guilty of more than negligence. The act is characterized by willfullness, rather than by inadvertence, it transcends negligence—[it] is different in kind."[42]

The different in kind theory, coming as it did after most courts had previously established that contributory negligence would not apply in intentional personal injury torts, thus served to provide an academic-sounding rationalization for a useful rule borne of sound social policy. The different in kind theory gave apparent legal basis for what courts had been doing instinctively for decades: seeking to punish and deter intentional tortfeasors, and most important, protecting personally injured plaintiffs from the harsh bar of contributory negligence.

The different in kind theory received strong reinforcement. Prosser embraced it—without citing authority—in his first hornbook in 1941.[43] Relying on *Gibbard*, the editors of *American Jurisprudence* stated in 1941 that the inapplicability of contributory negligence to intentional torts rested on the theory that the two types of conduct were "different in kind."[44] The theory gained momentum in the courts[45] and is today the accepted distinction between negligent

---

40. Atchison Ry. v. Baker, 79 Kan. 183, 189, 98 P. 804, 807 (1908). The distinction had been brewing in other courts for over two decades previous to *Atchison*. *E.g.*, Parker v. Pennsylvania Co., 134 Ind. 673, 678, 34 N.E. 504, 506 (1893); Labarge v. Pere Marquette Ry., 134 Mich. 139, 95 N.W. 1073 (1903); Redson v. Michigan Cent. Ry., 120 Mich. 671, 79 N.W. 939 (1899); Montgomery v. Lansing City Elec. Ry., 103 Mich. 46, 61 N.W. 543 (1894); Malmsten v. M. H. & O. Ry., 49 Mich. 94, 13 N.E. 373 (1882); Baumeister v. Grand Rapids & I. Ry., 63 Mich. 557, 30 N.W. 337 (1886); Galveston, Harrisburg & San Antonio Ry. v. Zantzinger, 92 Tex. 365, 48 S.W. 563 (1898).

41. 225 Mich. 311, 320-22, 196 N.W. 398, 401-02 (1923).

42. *Id.* at 320, 196 N.W. at 401.

43. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 402 (1941).

44. 38 AM. JUR. *Negligence* § 178, at 855 (1941).

45. *E.g.*, Cawog v. Rothbaum, 165 Cal. App. 2d 577, 588-91, 331 P.2d 1063, 1069-71 (1958); Wright v. Carey, 169 S.W.2d 749, 751 (Tex. Civ. App. 1943).

and intentional conduct.[46]

III. The Nature and Classification of Fault: Legal Doctrine, Social Policy, and Comparative Fault in Intentional Torts

With the advent of comparative fault and the rejection of contributory negligence in most states,[47] one major policy reason for ignoring the plaintiff's negligent conduct when an intentional tort is alleged—that of avoiding a bar to recovery[48]—is gone. The justification for retaining the rule must now rest, if at all, either on the theory of different in kind, or on the policies of deterrence, punishment, and avoidance of sanctioning self-help by defendants.

A. *The Theory of Different in Kind*

Courts traditionally have distinguished between classifications of fault in order to allocate sanctions fitting the conduct in question.[49] Before probing into the nature of these distinctions, it will be helpful to discuss the nature of fault itself.

The concept of fault is fairly new to tort law. Only toward the end of the nineteenth century did courts begin generally to predicate liability on fault, or as it was then often expressed, "moral responsi-

---

46. *E.g.*, W. Prosser, *supra* note 19, § 65, at 426. F. Harper & F. James, The Law of Torts § 22.5, at 1211 (1956); 5 Schwartz, *supra* note 23, § 5.2, at 101; H. Woods, *supra* note 23, § 7-7.1, and cases cited at 160 n.8; Shrager & Shepherd, *supra* note 24, at 430 n.48, 439-40; Timby & Plerak, *The Effect of Pennsylvania's Comparative Negligence Statute on Traditional Tort Concepts and Doctrines*, 24 Vill L. Rev. 453, 464 (1978-79). The rule is universally applied by the courts, although often in conclusory fashion. Butler v. Olshan, 280 Ala. 181, 194, 191 So. 2d 7, 19 (1966); Jackson v. Brantly, 378 So. 2d 1109, 1112 (Ala. Civ. App. 1979); Frontier Motors v. Horrall, 17 Ariz. App. 198, 201, 496 P.2d 624, 627 (1972); Civille v. Bullis, 209 Cal. App. 2d 134, 138, 25 Cal. Rptr. 578, 581 (1962); Villines v. Tomerlin, 206 Cal. App. 2d 448, 458, 23 Cal. Rptr. 617, 623 (1962); Tate v. Cononica, 180 Cal. App. 2d 898, 909, 5 Cal. Rptr. 28, 36 (1960) (citing cases); Richardson v. Pridmore, 97 Cal. App. 2d 124, 131, 217 P.2d 113, 118 (1950); Goldman v. House, 93 Cal. App. 2d 572, 575, 209 P.2d 639, 641-42 (1949); White v. Gill, 309 So. 2d 744, 746 (La. Ct. App. 1975); South Tex. Lloyds v. Jones, 273 So. 2d 853, 855 (La. Ct. App. 1973); Jenkins v. North Carolina Dept. of Motor Vehicles, 244 N.C. 560, 564, 94 S.E.2d 577, 581 (1956); City of Garland v. White, 368 S.W.2d 12, 17 (Tex. Civ. App. 1963); Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327, 329 (Tex. Civ. App. 1949); Wright v. Carey, 169 S.W.2d 749, 750-51 (Tex. Civ. App. 1943); Berkeley Bank for Corps. v. Miebos, 607 P.2d 798, 804 (Utah 1980); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 887 (W. Va. 1979).

47. *See supra* note 23.

48. *See supra* notes 24-39 and accompanying text.

49. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. (pts. 1-3) 315, 383, 441, 455-56 (1894).

bility."[50] Before then, liability was based almost solely on causation;[51] since then, legal scholars have argued about what fault is.[52] Prosser suggests that, in its broadest sense, " 'fault' means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors."[53] But before we can consider whether the three traditional classifications[54] of fault—negligent, reckless, and intentional conduct—are different in kind from one another, it is necessary to investigate further what we mean when we speak of fault.

This inquiry begins by analyzing selected relevant prima facie standards for each of the three general categories of fault. We will look not only to the traditional legal "terms of art" used to describe these classifications, but more importantly, we will attempt to articulate the general social norm that underlies these terms and classifications. Finally, we will critically analyze the evidence and premises supporting the assertion that classifications of fault are, on a theoretical level, substantively distinct to such an extent as to make them different in kind.

1. *Fault and Violation of the Social Norm*

To establish a cause of action based on fault,[55] plaintiff must show, at a minimum, that defendant violated a basic social norm to a certain degree. This norm, it is suggested, is that *persons should not knowingly engage in conduct that poses unjustifiable harm to others.* For convenience of discussion, the diagram below sets out the traditional terms of art used to describe the three classifications of fault, as well as the norm posited to underlie those classifications.

The norm articulated below suggests what might be termed the dual basis of our conception of fault;[56] its two components express both the moral and the social elements of fault. The proscription against *knowingly* engaging in certain activity reflects the moral as-

---

50. *See* O.W. HOLMES, THE COMMON LAW 144-63 (1881); Issacs, *Fault and Liability*, 31 HARV. L. REV. 954, 966 (1918).

51. W. PROSSER, *supra* note 19, § 75, at 492.

52. *Id.* at 492-94.

53. *Id.* at 493.

54. Wigmore, *supra* note 49, at 455-56.

55. *See* W. PROSSER, *supra* note 19, § 75, at 493.

56. *See* W. PROSSER, *supra* note 19, § 4, at 17-19 (discussing the moral and social aspects of fault).

Social Norm	*Classifications of Fault*				
	Negligence ◄		Recklessness ◄		► Intent
Persons should not knowingly	Actor *knew or should have known*	Actor *knew or really should have known*	Actor *intentionally encountered a known risk*	Actor *knew*	Actor *purposefully*
engage in conduct that poses	that his conduct posed an	that his conduct posed a	that posed a	that his conduct was	acted to
unjustifiable harm	*unreasonable risk of harm*	*highly unreasonable risk of harm*	*highly unreasonable risk of harm*	*substantially certain to cause harm*	*produce the resulting harm*

pect of the defendant's conduct.[57] As will be shown below, this knowledge component is satisfied either by actual or attributed knowledge on the part of the defendant. The second element of the norm proscribes socially *unjustifiable* conduct. With regard to this component of the norm we are concerned on the one hand with risk, or probability of harm. Courts balance the magnitude of this risk against the social utility or desirability of the subject conduct.[58]

It is suggested that all three classifications of fault are premised on violation of the above-described norm. The traditional differences in classification can be ascribed to the *degree* to which the subject conduct in each case is perceived to violate the two components of the norm. Because classification of fault is based on the degree of violation of the norm, it is clear that classifications are indeed different. Further, it is important to recognize the important function that labeling serves in facilitating communication about particular conduct. It is crucial, however, to emphasize *in what way* classifications of fault are different.

"Negligent fault" least violates the norm. With regard to this classification we do not require of the actor a high degree of knowledge; in fact, courts do not at all subjectively examine the actor's mind. Instead we *attribute*[59] to the actor a relatively low degree of *objective* knowledge. We say that he either *knew*, or *should have*

57. *Id.* at 16-19.

58. When, *in addition* to proving a legally sufficient violation of the two components of the above norm, a plaintiff can also prove the other elements of the cause of action—subject act, cause, proximate cause, and in some cases damages—and further, *absent* proof of a defense or privilege, then we can say that defendant is liable to plaintiff.

59. RESTATEMENT (SECOND) OF TORTS, § 290 comment (a), § 289 comment (b) (1965).

known, that his conduct was socially unjustified.[60] Courts also require for negligence a relatively low standard of social justifiability. We measure the social justification of the conduct by balancing the magnitude of the risk created by the conduct against the social utility of the conduct. When risk outweighs social utility, we say that the conduct is not socially justified because it poses an *unreasonable risk of harm.*[61]

What the courts classify as "recklessness" contemplates yet a greater violation of the norm. We recognize two ways to satisfy the knowledge element of the norm violation. We may attribute to the actor a relatively high degree of *objective* knowledge[62] by saying that he *"really" should have known* that his conduct was socially unjustified. Alternatively we may probe the actor's subjective mind to discover whether he *intentionally encountered a known risk.*[63] By using either method we require a high degree of knowledge regarding the norm violation. Similarly, we require for recklessness a high degree of social unjustifiability. We typically express this by saying that the actor's conduct poses a *highly unreasonable risk of harm.*[64]

"Intentional fault" most forcefully violates both the moral and social components of the norm. Under this classification we again recognize two ways to satisfy the norm violation. To meet the first branch of intentional fault, we ask whether the actor *knew* that his conduct was *substantially certain* to cause harm.[65] Thus we require a somewhat more dramatic violation of the knowledge component of the norm, and a very high degree of violation of the social justifiability component. In fact, with regard to conduct "substantially certain" to cause harm, courts effectively presume violation of the social justification component. But when we consider that proof of a common law privilege will completely justify the actor's conduct, we realize that even with regard to conduct substantially certain to cause harm we engage in balancing in order to determine social justification.

The second branch of the intentional fault classification contemplates the ultimate degree of violation of both components of the norm. As in the first branch, we analyze the actor's subjective mind. We inquire whether he acted with the highest degree of knowledge by asking if he *purposefully* acted to produce the socially unjustifi-

---

60. *Id.*
61. RESTATEMENT (SECOND) OF TORTS, § 291 comment (d) (1965).
62. RESTATEMENT (SECOND) OF TORTS, § 500 comment (a) (1965).
63. *Id.*
64. *Id.*
65. RESTATEMENT (SECOND) OF TORTS, § 8A comment (b) (1965).

able result.[66] We also undertake the most exacting scrutiny of social justifiability by asking if his purposeful act was done to *produce the resulting harm.*[67] Like the other branch of the intentional fault classification, this amounts to a presumptive violation of the social justification component of the norm. But again, considering the role of intentional tort privileges, it is clear that even at this highest degree of norm violation we engage in an analysis of social justification—the court will sanction as "justifiable" even conduct designed to produce the resulting harm, so long as a traditional privilege protects the actor's conduct.

2. *Are the Classifications of Fault Substantively Different?*

Is there support for the assertion commonly made that classifications of fault are on a theoretical level substantively distinct to such an extent as to make the classifications "different in kind"? Some have argued that because intentional tortfeasors "intend" the result, and negligent or reckless tortfeasors need not intend harm to be held at fault, the two classifications are contradictory and therefore substantively different.[68] But as explained above, the knowledge aspects of intentional fault are but higher degrees of the same knowledge component that courts attribute objectively to every negligent and to some reckless tortfeasors. Thus, distinguishing the two classifications on the basis of "intent" and "no intent" ignores the fact that each classification has a knowledge component that must be met. The difference in classification, as far as the knowledge component is concerned, is accounted for by the *degree* of knowledge we require—from a low level of objective knowledge (negligence) to a very high level of subjective knowledge (intent).

Although it is agreed that the three classifications of fault are different, this difference can be attributed to the *degree* to which our fact finders perceive the subject conduct as violating the moral and social components of the above norm. The three classifications reflect not different norms, but simply shades of violation of the same norm.

---

66. *Id.*

67. *Id.*

68. Donnelly v. Southern Pac. Co., 18 Cal. 2d 863, 118 P.2d 465 (1941):

> Negligence is an unintentional tort . . . . A negligent person has no desire to cause the harm that results from his carelessness, and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. Willfulness and negligence are contradictory terms. If conduct is negligent, it is not willful; if it is willful, it is not negligent.

Id. at 869, 118 P.2d at 468 (citations omitted). *See also* RESTATEMENT (SECOND) OF TORTS, § 500 comment (f) (1965).

It follows that if classifications of fault are thus distinguished (as the *Restatement* suggests)[69] by *degree*, comparisons between classifications can be made while retaining theoretical consistency. In other words, because the different in kind theory is without foundation, there is no *theoretical* obstacle to extending comparative fault principles to intentional torts.

3. *Judicial Challenges to the Different in Kind Theory*

Because courts for the past eighty years have made distinctions between classifications of fault based on supposed differences in kind rather than degree, courts today balk at the idea of comparing conduct that is asserted to be organically different. Accordingly, courts that adhere to the different in kind theory do not view fault as a continuum of the *degree* of norm violation, but instead as separate and defined categories of behavior distinct from each other. And yet, in many situations, these distinctions are difficult, if not impossible to make.[70] Writers have observed that the lines between classifications of negligence are more imagined than real,[71] and courts have

---

69. RESTATEMENT (SECOND) OF TORTS, § 8A comment (b) states:

> As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282.

RESTATEMENT (SECOND) OF TORTS, § 8A comment (b) (1965). But curiously, the *Restatement* also suggests that "difference in the degree" may be so "marked as to amount substantially to a difference in kind." *Id.* § 500 comment (g). The *Restatement* offers no support for this view. The apparent inconsistency with other language in the *Restatement* may reflect simply an attempt by its writers to effect a superficial compromise with existing precedents. This, however, is no theoretical justification for the assertion that classifications of negligence and recklessness are different in kind. We should conclude, as does Schwartz, that there is no support in the *Restatement* for the statement made in § 500 comment (g). *See* 5 SCHWARTZ, *supra* note 23, at 5-6 (Cal. Supp.).

70. Donnelly v. Southern Pac. Co., 18 Cal. 2d 863, 869, 118 P.2d 465, 468 (1941). Although the court found negligence and intent different in kind, it added that, "[i]t is frequently difficult, however, to characterize conduct as willful or negligent." *Id. But see* Green, *Illinois Negligence Law*, (pts. 1-3) 39 ILL. L. REV. 36 (1944) (listing cases in which the Illinois Supreme Court has maintained that "negligence and willfulness are as unmixable as oil and water"); 38 AM. JUR. *Negligence* § 178, 854-55 (1941) (asserting that the distinction between recklessness, negligence and intentional conduct is well defined).

71. "As the probability of injury to another, apparent from the facts within his knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it reaches that substantial certainty of harm which juries, and sometimes courts, may find inseparate from intent itself." W. PROSSER, *supra* note 19, § 31, at 145-46 (footnote omitted). *See generally* Mole & Wilson, *supra* note 11, at (pt. 1) 334 and authorities cited at nn.53-57. *Contra*, Brady, *Recklessness, Negligence, Indifference and Awareness*, 43 MOD. L. REV. 381, 383 (1980) (suggesting there are six "degrees" of recklessness). *But see* Winslade, *Brady on Reck-*

struggled to label conduct as negligent, reckless, or intentional.[72] For example, the court in *Hackbart v. Cincinnati Bengals*[73] noted that under the facts of the case, either battery or recklessness could have been alleged.[74] The court stated that "the two liability concepts are not necessarily opposed one to the other. Rather, recklessness under § 500 of the *Restatement* might be regarded, for the purpose of analysis at least, as a lesser included act."[75] In a similarly candid vein, the Supreme Court of Florida has stated that "the distinction between intent and negligence boils down to a matter of degree."[76] In *Bielski v. Schulze,*[77] the Supreme Court of Wisconsin abolished the doctrine of gross negligence, or recklessness, and dismissed the idea that negligence and recklessness are different "in kind."[78] And recently, in *Sorensen v. Allred,*[79] the California Court of Appeal suggested that abolishing "shades of negligence or other categorizations of fault would . . . streamlin[e] . . . the trial of cases."[80]

Thus, if one accepts the proposition that classifications of fault represent merely a continuum of the degree of violation of a common

---

lessness, 33 ANALYSIS 32 (1972); Winslade, *Recklessness*, 30 ANALYSIS 135 (1970) (arguing that the lines are blurred).

72. Prosser has observed that "the dividing line between intent and negligence has not always proved easy to draw." W. PROSSER, *supra* note 19, § 91, at 609. *See also id.* § 31, at 145-46; Comment, *supra* note 36, at 189, cases and authorities cited at n.58.

73. 601 F.2d 516 (10th Cir. 1979).

74. *Id.* at 524. *See, e.g.*, Comment, 11 RUT.-CAM. L. REV. 497 (1980); Note, *Professional Sports and Tort Liability: A Victory for the Intentionally Injured Player*, 1980 DET. C.L. REV. 687; Note, *Torts in Sports—Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764 (1980).

75. *Hackbart*, 601 F.2d at 524. *See also* RESTATEMENT (SECOND) OF TORTS, § 8A comment (b), *quoted supra* note 69; 5 SCHWARTZ, *supra* note 23, at 5-6 (Cal. Supp.); Matheson v. Pearson, 619 P.2d 321 (Utah 1980) (plaintiff's original suit for battery with a tootsie pop might alternatively be pleaded as recklessness in order to avoid the bar imposed by statute of limitations); Sandifer Motors Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 628 P.2d 239 (1981). In *Sandifer* the court of appeals characterized what seems to have been intentional conduct as negligence in order to apply comparative fault principles. *See infra* notes 157-160 and accompanying text.

76. Spivey v. Battaglia, 258 So. 2d 815, 817 (Fla. 1972).

77. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

78. "Gradually, gross negligence acquired by metamorphosis a new nature: — ordinary negligence lay in the field of inadvertence but gross negligence in the field of actual or constructive intent to injure, and the two did not grade into each other." *Id.* at 15, 114 N.W.2d at 112 (footnote omitted). The court concluded that the tort law of Wisconsin could do well without the doctrine: "gross negligence as a vehicle of social policy no longer fulfills a purpose in comparative negligence." *Id.* at 7, 114 N.W.2d at 113.

79. 112 Cal App. 3d 717, 169 Cal. Rptr. 441 (1980).

80. *Id.* at 725, 169 Cal. Rptr. at 446. The court continued: "[t]he submission to triers of fact, particularly juries, of issues of liability upon the simply stated question, 'Whose fault was it, and, if both are at fault, what are the degrees of each,' places the issues in a context more readily understood." *Id.*

social norm, the suggestion that fault can be classified into conduct "different in kind" seems without theoretical foundation. If this is the case, rejection of comparative fault when an intentional tort is alleged against a defendant must rest solely on social policy considerations.

B. *Deterrence, Punishment, and Avoidance of Sanctioning Self-Help by Defendants*

Although the asserted primary purpose of tort law is compensation of plaintiffs,[81] some writers have noted that judgments themselves serve to deter "repetition of . . . wrongful conduct and serve as a warning to others who are inclined to commit similar wrongs," and that imposition of liability fulfills an "admonitory function" by punishing the tortfeasor.[82] Closely related is the idea that tort law provides an organized and controlled forum for meting out social retribution.[83] The argument follows that these ancillary attributes of the tort system are all the more desirable in cases of intentional wrongdoing; that by treating an intentionally acting tortfeasor more harshly[84] than his negligent counterpart, future conduct will be deterred, present conduct will be punished, and society's need for vindication will be satisfied.

Still, it may be questioned whether prospective intentional tortfeasors are actually deterred by the current rule.[85] Indeed, the

---

81. W. PROSSER, *supra* note 19, § 2, at 6.

82. *E.g.*, Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1172, 1174-77 (1931); Note, *Exemplary Damages in The Law of Torts*, 70 HARV. L. REV. 517, 520 (1957); Note, *In Defense of Punitive Damages*, 55 N.Y.U.L. REV. 303, 305 (1980). The deterrence justification for contributory negligence has been thoroughly discredited by Fleming, *supra* note 25, at 243-44. O'Connel, however, asserts that anything short of full recovery for the plaintiff seriously reduces the deterrent effect of tort law. O'Connel, *A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 LAW FORUM 591.

83. "If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution." O.W. HOLMES, THE COMMON LAW 41-42 (1881). *See generally* Morris, *supra* note 82, at 1173; Note, *Exemplary Damages*, *supra* note 82, at 521-22.

84. Traditionally, intentional tortfeasors, in comparison to negligent actors, have been denied contribution and the use of the contributory negligence defense, and have been subject to punitive damages.

85. Note, *The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STAN. L. REV. 362, 365 (1962); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 133-34 (1932). With respect to the notion of deterrence in recklessness actions, see Sorensen v. Allred, 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441, 446 (1980). A similar criticism of the antideterrent effect of the traditional rule has been recognized with regard to the old "active/passive" distinction (Leflar, *supra* at 156-58) for invoking contribution or indemnity. Traditional doctrine produces the illogical effect of con-

tenuous deterrent argument has recently been rejected in favor of expanding the application of comparative fault in strict tort liability[86] and in recklessness[87] actions. Further, punishment, if it is to remain a goal of tort law, can be achieved by imposing punitive damages.[88] And yet, there are additional valid considerations of social policy that support the traditional rule with regard to many intentional torts.

Some types of intentional torts are by their nature so offensive to our customs and values that we should as a matter of social policy decline to apply comparative fault principles, lest the courts appear to sanction or facilitate the proscribed conduct. "Self-help" measures resulting in damage to persons or property would be the most obvious conduct included in this category. Thus, in a typical battery, assault or trespass case, although the different in kind theory of fault should not itself prevent comparison of a defendant's fault with a plaintiff's negligent or reckless conduct, social policy considerations should prevent such a comparison. In other intentional tort cases not reflecting self-help—for example, nuisance—the defendant's conduct, although it may violate the social norm, often will not reflect the same degree of social opprobrium that attaches to battery.

By a battery, a defendant effectively takes the law into his own hands. This vigilante aspect, in conjunction with an offensive physi-

---

doning negligent or even reckless conduct by tortfeasors who operate with another "more faulty" defendant deemed to have acted intentionally. Thus, in Gardner v. Murphy, 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975), a negligent codefendant whose fault was termed "passive" escaped all liability simply because the other defendant, whose fault was termed "active," acted intentionally. But "[b]y allowing a negligent tortfeasor to escape all the consequences of his own acts through indemnity, the California courts in effect give him the same status as a negligent tortfeasor in an intentional tort action." Comment, *supra* note 36, at 193. One writer has questioned, "[i]s there any sound public policy which justifies a rule of law which exculpates from liability an admitted wrongdoer merely because a second wrongdoer has intervened and assisted in causing the plaintiff harm"? Eldredge, *Culpable Intervention As Superseding Cause*, 86 U. PA. L. REV. 121, 129 (1937). Courts have, however, held a negligent codefendant fully liable when the intentionally acting codefendant is judgment-proof. Comment, *supra* note 36, at 194 n.86. Finally, it has been observed that the rule denying contribution among intentional tortfeasors might actually increase a wrongdoer's willingness to engage in tortious conduct. Leflar, *supra* at 135-37.

86. Daly v. General Motors Corp., 20 Cal. 3d 725, 737-38, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978).

87. Sorensen v. Allred, 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441, 446 (1980); Jarvis v. Southern Pac. Transp. Co., 142 Cal. App. 3d 246, 255-56, 191 Cal. Rptr. 29, 34 (1983); Zavala v. Regents of Univ. of Cal., 125 Cal. App. 3d 646, 650, 178 Cal. Rptr. 185, 187 (1981); Southern Pac. v. State, 115 Cal. App. 3d 116, 171 Cal. Rptr. 187 (1981); Plyler v. Wheaton Van Lines, 640 F.2d 1091, 1092-93 (9th Cir. 1981).

88. Comment, *supra* note 36, at 199 nn.123-25.

cal touching, directly challenges a fundamental tenet of civilized conduct. However, although battery reflects self-help (that is, deliberate change from appropriate social behavior to norm-violating behavior), many nuisance cases reflect at the most complacent, albeit deliberate, willingness to allow existing norm-violating conditions to continue. A nuisance typically does not offend our social values to the same extent as a battery because the deliberate change in behavior that characterizes self-help is absent. In this regard, an intentional nuisance may be no more socially offensive than "mere" negligent or reckless conduct. Therefore, when the facts of an intentional nuisance case indicate absence of self-help, social policy considerations would not prevent application of comparative fault principles.

Social policy considerations of avoiding the appearance of sanctioning or facilitating self-help should be the key to whether comparative fault should be applied in a given case. When courts decline to apply comparative fault in intentional torts, they should do so expressly for reasons of social policy and not because of formalistic adherence to an ill-conceived notion that negligent, reckless and intentional torts are different in kind.

IV. Recent Cases: The Trend Toward Comparison

As shown above, social policy considerations militate against extension of comparative fault in many intentional tort cases. However, under circumstances in which application of comparative fault could not be seen as facilitating or sanctioning self-help, social policy considerations argue for, not against, extension of comparative fault. As recent recklessness, strict liability, and contribution cases discussed below demonstrate, there is a strong policy objective to be achieved by fully analyzing a plaintiff's conduct, and by reducing his damages accordingly. The lengths to which some courts have reached to accomplish this policy in battery suits is striking testimony both to the desirability of a rule that would allow full consideration of all parties' conduct, regardless of classification of fault, and to the dangers of unrestrained application of the comparative fault rule. Finally, recent intentional nuisance cases analyzed below dramatize the conflict courts face in attempting on the one hand to apply the law as it exists, and on the other hand, to achieve socially desirable results consistent with comparative fault principles.

A. *Rejection of the Different in Kind Theory in Favor of Comparison: Recklessness, Strict Liability, and Contribution*

1. Recklessness

Although some commentators still maintain that recklessness and negligence are different in kind and should not be compared,[89] courts recently have applied comparative fault principles in such cases. In *Sorensen v. Allred*,[90] for example, the California Court of Appeal held that a plaintiff's contributing negligence should be compared to a defendant's recklessness.[91] In doing so, the court noted that "no defensible reason exists for categorizing willful and wanton misconduct as a different kind of negligence not suitable for comparison with any other kind of negligence."[92] The *Sorensen* court further suggested that, even if the two types of conduct were considered different not only in degree but in kind as well, comparison should still be allowed purely on the basis of social policy to attain a more comprehensive system of comparative fault.[93]

2. *Strict Tort Liability*

It has been easier for courts to explain extending comparative fault analysis to cases involving recklessness than to cases involving strict tort liability. In the recklessness context, courts can apply comparative principles based either on the social policy goal of promot-

---

89. Schrager & Shepherd, *supra* note 24, at 440-41. *Contra* Schwartz, *supra* note 24, at 1480.

90. 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980).

91. *Id.* at 725, 169 Cal. Rptr. at 446. The *Sorensen* court would allow comparison in all cases involving conduct "traditionally described as willful and wanton." *Id.* at 726, 169 Cal. Rptr. at 446. In doing so the court distinguished Kindt v. Kaufman, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976) (contributory negligence not a defense to charge of willful misconduct). *See* Southern Pac. v. State, 115 Cal. App. 116, 121, 171 Cal. Rptr. 187, 190-91 (1981) (the category of fault termed "willful misconduct" (recklessness), which was designed to avoid the contributory negligence bar, is unnecessary under a comparative fault system). *Sorensen* was followed in Zavala v. Regents of Univ. of Cal., 125 Cal. App. 3d 646, 650, 178 Cal. Rptr. 185, 187 (1981) and by the Ninth Circuit Court of Appeals, applying California law, in Plyler v. Wheaton Van Lines, 640 F.2d 1091, 1092-93 (1981). *See also* Jarvis v. Southern Pac. Transp. Co., 142 Cal. App. 3d 246, 255-56, 191 Cal. Rptr. 29, 34 (1983).

92. 112 Cal. App. 3d at 722-23, 169 Cal. Rptr. at 446. *See also* 5 SCHWARTZ, *supra* note 23, at 6 (Cal. Supp.) (asserting that there is no difference between "objective recklessness" and negligence).

93. 112 Cal. App. 3d at 725, 169 Cal. Rptr. at 444, (quoting 5 SCHWARTZ, *supra* note 23, § 5.3, at 108). The court noted that "[t]he elimination of willful misconduct as a bar to recovery offers justice to both plaintiffs and defendants in situations where it is now all or nothing." *Id.* at 726, 169 Cal. Rptr. at 446. *See also* Li v. Yellow Cab. Co., 13 Cal. 3d 804, 825-26, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975).

ing equitable allocation of loss, or by rejection of the theory of different in kind.[94] But only attainment of the social policy goal justifies extension of comparative principles to strict tort liability, because fault and no-fault are truly conduct different in kind.[95] The California Supreme Court recognized this in *Daly v. General Motors Corp.*,[96] in which it allowed a plaintiff's negligence to be compared to a defendant's strict tort liability.[97] The court noted that "[f]ixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire."[98]

Although some courts and commentators continue to protest that negligence and strict tort liability should not be compared because they are truly different in kind,[99] the trend favors extending

---

94. The *Sorensen* court, *supra* notes 90-93 and accompanying text, was apparently prepared to base its decision on either ground.

95. One commentator has attempted to harmonize the comparison of fault and no-fault by arguing that strict liability is simply another form of fault. Carestia, *Comparative Principles and Products Liability in Montana*, 41 MONT. L. REV. 269, 271-72 (1980). *See also* Davis, *Product Liability Under Section 402A of the Restatement (Second) of Torts and The Model Uniform Product Liability Act*, 16 WAKE FOREST L. REV. 513, 537 (1980); Fleming, *supra* note 25, at 270.

Another theory recently advanced for the extension of comparative fault to strict liability is found in Kennedy v. City of Sawyer, 228 Kan. 439, 452, 618 P.2d 788, 798 (1980). The *Kennedy* court interpreted the term "negligence" in the Kansas comparative negligence statute to mean "causation," and proceeded to apply comparative principles to a defendant liable under strict liability. Such an approach disregards the fundamental difference between fault and causation.

Apportionment based on fault is a rough approximation of the liability of the parties. Admittedly the allocation is not an exact or scientific one; the use of comparative fault stems from the idea that when causation is attributable to more than one party it is better to apply a rough distribution of the loss between the parties than to unduly burden or benefit one side by fully granting or completely denying recovery.

Apportionment based on cause, on the other hand, rests on the premise that the component parts of the total damage figure can be isolated and assigned to the party causally responsible. The theory by definition rejects the idea that two actors have concurred to cause a result; it posits a state of isolated causation not descriptive of the vast majority of cases involving mutual causes.

96. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

97. *Id.* at 734, 575 P.2d at 1164, 144 Cal. Rptr. at 385. In comparison, the *Sorensen* court noted that it was easier to rationalize the use of comparative fault in recklessness cases: "[w]e are . . . not comparing apples and oranges . . . but rather two varieties of oranges (simple negligence versus gross negligence) or at worst oranges and lemons . . . ." Sorensen v. Allred, 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441, 445 (1980).

98. 20 Cal. 3d at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386. *But see id.* at 757-64, 575 P.2d at 1181-86, 144 Cal. Rptr. at 399-404 (Mosk, J., dissenting).

99. Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 355 (1977); Note, 16 GONZ. L. REV. 247 (1980); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages*

comparative fault to strict tort liability. Writers supporting comparison of fault and no-fault have argued that the "attainment of a just and equitable result must ultimately prevail if the system is to regain balance and retain societal approval."[100] The *Daly* court followed this approach, noting that the adoption of comparative negligence in California was designed "to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault."[101]

3. *Contribution and Indemnity Among Defendants Liable for Different Classifications of Fault*

At common law, contribution and indemnity operated under different rules.[102] Although this remains so in many jurisdictions today,[103] the introduction of comparative principles to apportion damages between defendants has blurred and in some cases obliterated these distinctions.[104] In states that apply comparative fault principles, the terms "partial indemnity," "partial contribution," "comparative indemnity," or "comparative contribution" may be used to express the same notion. No matter what term is used, however, the common issue is whether or not apportionment of damages will be employed when the parties' liability rests on different classifications of fault.

In earlier cases this determination often turned on whether the conduct of the defendant could be termed active or passive.[105] This

---

Among Multiple Defendants, 50 S. CAL. L. REV. 73 (1976); Note, 56 WASH. L. REV. 307 (1980); Note, *Comparative Negligence Collides with Strict Liability: Will Tort Law Ever be the Same?*, 19 WASHBURN L. REV. 76, 101-02 (1979). This trend has occurred despite the fact that it requires courts to compare conduct truly different in kind. Note, *Assumption of Risk as the Only Affirmative Defense Available in Strict Products Liability Actions in Oregon:* Baccelleri v. Huster Co., 17 WILLAMETTE L.J. 495 (1981); Note, 25 VILL. L. REV. 1072 (1979-80). *See* numerous citations supporting adoption of comparative principles in strict tort liability actions in Daly v. General Motors Corp., 20 Cal. 3d 725, 740-41, 575 P.2d 1162, 1171, 144 Cal. Rptr. 380, 389 (1978).

100. Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault,* 11 TEX. TECH. L. REV. 729, 761 (1980) (footnote omitted). *See generally* Fleming, *supra* note 25.

101. Daly v. General Motors Corp., 20 Cal. 3d 725, 737, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978).

102. W. PROSSER, *supra* note 19, § 51, at 310 (under contribution, loss was distributed pro rata among tortfeasors; under indemnity, the entire loss was shifted to one tortfeasor).

103. *Id.*

104. *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

105. *Id.* at 594-98, 578 P.2d at 908-12, 146 Cal. Rptr. at 192-95; Comment, *supra* note 36, at 181-99.

distinction was rejected by the New York Court of Appeals,[106] which has stated that it will permit "apportionment of damages among joint tort-feasors *regardless of the degree or nature of the concurring fault.*"[107]

Similarly, the California Supreme Court has extended partial indemnity for social policy reasons, although the liability of one co-defendant rested in negligence, and the other in strict liability.[108] Rejecting arguments that different bases of liability precluded comparison, the court stated that "the suggested [doctrinal] difficulties are more theoretical than practical, and experience in other jurisdictions demonstrates that juries are fully competent to apply comparative fault principles between negligent and strictly liable defendants."[109] The court noted that comparison was compelled in order to achieve full allocation of responsibility for loss among all parties liable for the damages.[110]

* * *

Extension of comparative fault principles to non-self-help intentional torts can be based on policy considerations similar to those that impelled courts to extend comparison to recklessness, strict liability, and contribution among defendants liable for different classifications of fault. With rare and well-founded exceptions,[111] compara-

---

106. *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972) (apportionment of damages between tortfeasors in negligence cases).

107. Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 29, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972) (emphasis added). One writer has observed that this language seems to embrace comparison of *all* forms of fault, including intentional conduct. *See* Comment, *supra* note 36, at 192, 196 n.99. This is not an unreasonable reading of the case. *Kelly* speaks of "distribut[ing] the loss in proportion to the allocable concurring fault." 31 N.Y.2d at 29, 286 N.E.2d at 243, 334 N.Y.S.2d at 854. *See also* Sorrentino v. United States, 344 F. Supp. 1308, 1309 (E.D.N.Y. 1972). But as yet no cases following either *Kelly* or *Dole* have gone so far as to include intentional torts. Still, the decision is significant for its refutation of the different in kind theory in favor of allocation of loss in proportion to fault. *Kelly*, 31 N.Y.2d at 29, 285 N.E.2d at 243, 334 N.Y.S.2d at 854. The *Kelly* court concluded, "[w]e believe the new rule of apportionment to be pragmatically sound, as well as realistically fair." *Id.*

108. Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

109. *Id.* at 331, 579 P.2d at 446, 146 Cal. Rptr. at 555 (and authorities cited).

110. *Id.* at 332, 579 P.2d at 446, 146 Cal. Rptr. at 555.

111. Generally, a plaintiff's inadvertent negligence has no effect in cases based on liability per se (violation of criminal statute) or related actions based on statutory strict liability (violation of civil statute). This makes sense, because plaintiffs within the class of "helpless" persons protected by a statute cannot be expected to exercise reasonable care for themselves. *See* Seim v. Garavalia, 306 N.W.2d 806 (Minn. 1981). In *Seim* the defendant dog owner was held liable for a dog bite under a civil statute that imposed strict liability on dog owners. The plaintiff, a seven-year-old girl, was negligent in petting the dog. The Minnesota Supreme

tive fault principles are applied to almost every tort action except intentional torts. Although exception of "self-help" intentional torts is compelled by social policy considerations, those same considerations would not prevent application of comparative fault to intentional torts that are not characterized by self-help. Indeed, exclusion of intentional non-self-help torts from comparative fault analysis violates important social policy goals. It results in inconsistent application of comparative fault principles[112] and incomplete consideration of the question of plaintiff compensation.[113] It has the questionable

---

Court held that although comparative fault was the general rule in the state, and although comparative fault had been extended to strict liability cases, nevertheless a defendant liable under a civil statute could not compare his conduct with that of the plaintiff. The court recognized that it applied what might be termed "absolute statutory strict liability." *See also* Zerby v. Warren, 297 Minn. 134, 138-39, 210 N.W.2d 58, 61-62 (1973) (defendant liable per se for violation of criminal statute designed to protect minor plaintiffs from glue sniffing).

112. *See* Sorensen v. Allred, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980), discussed *supra* notes 90-93 and accompanying text.

113. The primary goal of tort law is compensation of plaintiffs. W. PROSSER, *supra* note 19, § 2, at 7. Implicit in the notion of compensation is the idea that, unless an overriding social policy mandates otherwise, a plaintiff should recover actual damages only for that portion of the loss for which he is not at fault. Thus, in a typical non-self-help intentional nuisance case, if a plaintiff's fault has contributed in some degree to his damages, he should have no right to demand that others compensate him for that portion of his loss. Such a plaintiff who is, for example, 40% at fault for his $10,000 loss should have a right to recover only $6,000 from the defendant. The plaintiff should have no legal right to compel others to compensate him for the remaining $4,000. The law should treat this as a loss inflicted by the plaintiff on himself.

Currently, of course, defendants against whom non-self-help intentional conduct is proved are forced to pay full compensatory damages. Hence, plaintiffs themselves at fault but who are victims of non-self-help intentional torts receive a windfall when it comes time to determine compensatory damages. Negligent and even reckless plaintiffs are therefore rewarded for the fortuity of their having concurred with non-self-help intentional tortfeasors to cause damage to themselves.

Failure of the courts to provide for comparison in appropriate intentional tort cases also ignores the realities of jury decision making. W. PROSSER, *supra* note 19, § 67, at 433, writes that "juries are notoriously inclined . . . to [disregard the court's instructions and to] make some more or less haphazard reduction of the plaintiff's damages in proportion to his fault." *See also* Maloney, *From Contributory to Comparative Negligence, Needed Law Reform*, 11 U. FLA. L. REV. 135, 144-45 (1958) ("in many cases the jurors will disregard instructions on the law and 'do equity' as they see it"). In Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938), the court said, "[w]e but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply [apportionment of damages] in spite of [the court's instructions]." In a candid opinion, the Supreme Court of Pennsylvania in Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955) affirmed a verdict in which the jury applied comparative negligence to reduce a plaintiff's damages even though the doctrine of contributory negligence prevailed at the time:

> The doctrine of comparative negligence, or degrees of negligence, is not recognized by the Courts of Pennsylvania, but as a practical matter they are frequently taken into consideration by a jury. The net result . . . is that . . . the jury brings in a compromise verdict . . . much smaller in amount than they

and unnecessary[114] effect of ignoring and, by inaction, condoning negligent or reckless conduct by plaintiffs. At the same time the deterrent value of allowing full recovery is at best suspect,[115] and the punishment goal, if it is a valid consideration of tort law, can be attained through imposition of punitive damages.[116]

B. *Trends Toward Comparison in Intentional Torts: Battery and Nuisance*

Although some courts have struggled to attain equitable results through application of comparative fault principles in intentional torts, the cases thus far demonstrate unfortunate confusion as to the proper role of social policy considerations. In a number of cases, courts of the southern states have violated the approach proposed in

---

> would have awarded . . . if they were convinced that the plaintiffs were free from contributory negligence.

Id. at 234-35, 114 A.2d at 154. *Cf.* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966). In their study of criminal juries, the authors made numerous observations of jurors' tendencies to consider conduct of the victim, in direct disregard of instructions. *Id.*, *Contributory Fault of the Victim*, at 242-57. They observed that "cases having a *de minimus* cast or a note of contributory fault or provocation . . . present . . . occasions for . . . the jury [to] exercise its de facto power to write . . . equities into the criminal law." *Id.* at 285.

114. The contributory negligence rule was necessary, according to the early common law, because of the "impossibility" of apportioning damages. Needham v. San Francisco & S.J. Ry. Co., 37 Cal. 409 (1869). In reality, the courts feared that juries might be inclined to award unreasonable sums to plaintiffs at the expense of growing industries. *See* T. SHEARMAN & S. REDFIELD, *supra* note 31, at § 63 (1898); Prosser, *supra* note 11, at 4; Goldberg, *supra* note 25 at 3-5; Turk, *supra* note 4, explains that:

> When . . . big and remote corporate defendants, especially railroads, entered the scene, the average juror, often regarding such defendants to be intruders as well as immensely rich, became plaintiff-minded. By adoption of the doctrine of contributory negligence, a court could, in many cases, find a welcome means by which to control, or even to eliminate, the jury. Specific features of plaintiff behavior, acts or omissions which would be apt to recur frequently in special types of cases, as for instance in railroad crossing accidents, could be handled by rule-of-thumb judgments, soon to be regarded as rules of law, leaving nothing to be considered by the jury. Thus, the issue of contributory negligence came to be "an ingenious device which gave the court almost complete freedom to accept or reject jury participation at its pleasure."

Id. at 198-99 (footnotes omitted) (quoting Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 155-59 (1946)). Apparently this was never a problem in the admiralty courts which used a form of apportionment, but did not depend on juries. T. SHEARMAN & A. REDFIELD, *supra* note 31, § 63 (1898). But now that courts are comfortable allowing juries to apportion damages even between negligent and strictly liable parties (*see e.g.*, *supra* notes 94-101, 108-110 and accompanying text; Daly v. General Motors Corp., 20 Cal. 3d 725, 738-39, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978)), there is no reason to believe juries are unable to apportion liability between two parties who are at fault, albeit negligence or recklessness versus intentional fault.

115. *See supra* notes 82 and 85 and accompanying text.

116. *See supra* notes 82-88 and accompanying text.

this article, by allowing comparison even when the defendant's intentional conduct constituted self-help. Conversely, other courts have declined to apply comparative fault principles in intentional nuisance cases—cases in which self-help was not involved. The confused and antisocial results reached by these two groups of courts highlight the need for a reasoned understanding of the proper role of comparative fault in intentional torts.

1. *Battery*

a. *The Early Cases*

At common law, the defenses to intentional torts were in theory absolute. If the defendant could establish one of the recognized privileges,[117] the plaintiff was barred from recovery.[118] At the same time, if the plaintiff could establish an intentional tort, his faulty conduct was in theory irrelevant to his recovery.

Some early courts, uncomfortable with such rigid rules, began to consider plaintiffs' faulty conduct in regard to damages awards. Thus, although it has been almost universally held that a plaintiff's conduct can never justify an intentional tort committed against him,[119] these courts considered such conduct in mitigation of damages.[120] Similarly, although most states that allowed punitive damages also allowed consideration of a plaintiff's conduct to preclude or reduce those damages,[121] apparently to disprove malice,[122] states split on the question of reducing a plaintiff's *compensatory* or *actual* damages because of his faulty conduct.[123]

---

117. W. PROSSER, *supra* note 19, ch. 4.

118. *Id.* § 16, at 99.

119. *Id.* § 19, at 110; Note, 41 TEX. L. REV. 124, 125 (1962). *See* Grau v. Forge, 183 Ky. 521, 209 S.W. 369 (1919); Elliot v. Brown, 2 Wend. 497 (N.Y. Sup. Ct. 1829); Unruh v. Murray, 84 N.W.2d 730 (N. Dak. 1957); Thorne v. Unemployment Compensation Bd. of Review, 167 Pa. Super. 572, 76 A.2d 485 (1950). The minority view originated in Louisiana. Although words alone no longer justify an assault in that state, Morneau v. American Oil Co., 272 So. 2d 313, 315-16 (La. 1973) (reversing earlier cases; *see* Note, 34 LA. L. REV. 137 (1973)), provocative *conduct* by the plaintiff still bars his recovery. Tripoli v. Gurry, 253 La. 473, 475, 218 So. 2d 563, 565 (La. 1969) (upholding "aggressor doctrine"); *see also* Freeman v. Logan, 475 S.W.2d 636, 639 (Ky. 1972); Coleman v. Moore, 426 So. 2d 652, 653 (La. Ct. App. 1982); Graves v. Irwin, 396 So. 2d 384, 386 (La. Ct. App. 1981); Matthews v. Sno's Seafood & Steak House, Inc., 356 So. 2d 527, 529 (La. Ct. App. 1977); 6 AM. JUR. 2D *Assault and Battery* § 151 (1963 & Supp. 1983). *But see* Note, 14 FORDHAM L. REV. 95, 98 (1945) (discrediting the rule).

120. W. PROSSER, *supra* note 19, § 19, at 110.

121. *Id.*; *see also* Note, 14 FORDHAM L. REV. 95, 96-97 (1945).

122. Note, *supra* note 121, at 96-97 nn.14-15.

123. Annot., 63 A.L.R. 890 (1929) (and supplementing cases). *See* Goldsmith's Adm'r

Jurisdictions that did allow reduction of compensatory damages based their decisions on an "inverse punitive damages"[124] theory. Speaking for the Wisconsin Supreme Court in *Morely v. Dunbar*,[125] Chief Justice Dixon explained why the plaintiff's actual damages in a suit for assault and battery were reduced:

> [P]rovocation . . . though not sufficient to entirely justify the act done, may constitute an excuse which will mitigate the actual damages; and, where the provocation is great . . . may reduce them to a sum which is merely nominal. This seems to follow as the necessary and logical result of the rule which permits exemplary damages to be recovered. Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If malice in the defendant is to be punished by the imposition of additional damages, or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled.[126]

Although not expressly doing so, these courts were applying comparative fault to self-help intentional torts.[127] This is clearest in an early Connecticut case in which there had been a battery following several hours of provocation. The court observed that "the jury were bound to consider the whole transaction . . . . They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defen-

---

v. Joy, 61 Vt. 488, 490-92, 17 A. 1010, 1012-14 (1889) (excellent discussion of the opposing views).

124. "[M]itigation of damages is only punitive damages in another form." Note, 16 HARV. L. REV. 591, 591 (1902). *Accord*, Note, 41 TEX. L. REV. 124, 127 (1962). Sedgwick articulated the theory in II. T. SEDGWICK, MEASURE OF DAMAGES (7th ed. 1880):

> Where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be, and is practically, mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure.

Id. at 521 n.b.

125. 24 Wis. 183 (1869).

126. *Id.* at 187; *see also id.* citations at 188. *Morely* was subsequently modified against the vehement dissent of Chief Justice Dixon in Wilson v. Young, 31 Wis. 574 (1872). *See infra* note 130.

127. That courts did not openly recognize this is understandable because comparative fault was neither widely used nor well thought of even in negligence cases. *See supra* note 19.

dant, and give damages accordingly."[128]

Although many courts allowed reduction of compensatory damages,[129] an equal number did not,[130] fearing that to do so would "virtually . . . allow provocation as a [complete] defense."[131] Today the majority of states still deny reduction of compensatory damages,[132] but a growing minority of states allow such reduction.[133]

b. *The Modern Cases*

In *Comer v. Gregory*,[134] the Supreme Court of Mississippi up-

128. Burke v. Melvin, 45 Conn. 243, 246 (1877).

129. *E.g.*, Keiser v. Smith, 71 Ala. 481 (1882); Ireland v. Elliott, 5 Iowa 78 (1858); Avery v. Ray, 1 Mass. 11 (1804); Kiff v. Youmans, 86 N.Y. 324, 330-31 (1881); Robison v. Rupert, 23 Pa. 523, 525 (1854); Goldsmith's Adm'r v. Joy, 17 A. 1010, 1012-13 (Ver. 1889); Note, 16 HARV. L. REV. 591 (1902); Annot., 63 A.L.R. 890, 894-96 (1929). *See also* Linford v. Lake, 3 Hurl. & N. 276, 157 Eng. Rep. 475 (1858); Perkins v. Vaughan, 5 Scott, N.R. 881, 134 Eng. Rep. 405 (1842); Fraser v. Berkeley, 7 Car. & P. 621, 173 Eng. Rep. 272 (1836).

130. *E.g.*, Mitchell v. Gambill, 140 Ala. 316, 320, 37 So. 290, 291 (1904); Prentiss v. Shaw, 56 Me. 427, 436-38 (1869); Baltimore Transit Co. v. Faulkner, 179 Md. 598, 20 A.2d 485 (1941); Goldsmith's Adm'r v. Joy, 17 A. 1010, 1013-14 (Ver. 1889); Crotteau v. Karlgaard, 48 Wis. 2d 245, 250, 179 N.W.2d 797, 800 (1970); Corcovan v. Harran, 55 Wis. 120, 12 N.W. 468 (1882); Fenelon v. Butts, 53 Wis. 344, 351, 10 N.W. 501, 503 (1881). In Wilson v. Young, 31 Wis. 574 (1872), the court sought a middle ground, allowing reduction of a plaintiff's "personal" damages but not his "actual" damages. But see Chief Justice Dixon's vehement dissent contesting this distinction, *id.* at 585-92. A similar distinction was attempted in Ulrich v. Schwarz, 199 Wis. 24, 225 N.W. 195 (1929). *See* Note, 14 FORDHAM L. REV. 95, 97 nn.16 & 23 (1945).

131. Donnelly v. Harris, 41 Ill. 126, 128 (1866).

132. *E.g.*, Mangus v. Miller, 35 Colo. App. 335, 535 P.2d 219 (1975); Haumont v. Alexander, 190 Neb. 637, 211 N.W.2d 119 (1973); Tevis v. Tevis, 155 N.J. Super. 273, 280, 382 A.2d 697, 701 (1978); Fordyce v. Montgomery, 424 S.W.2d 746, 751 nn.4 & 5 (Mo. 1968); Beville v. Mac K. Falls, Inc. 49 Or. App. 477, 481-82, 619 P.2d 958, 960 (1980); Taylor v. Gentry, 494 S.W.2d 243, 247 (Tex. Civ. App. 1973). These holdings are analagous to the rule that the doctrine of mitigation of damages applies only to nonintentional conduct. *See* Meadolake Foods Inc. v. Estes, 218 S.W. 2d 862, 868 (Tex Civ. App. 1948); Smith v. International Printing P. & A. Union, 190 S.W.2d 769, 775 (Tex. Civ. App. 1945). *But see* Loker v. Damon, 17 Pick. 284, 288 (Mass. 1835); Galveston Harrisburg & San Antonio Ry. v. Zantzinger, 92 Tex. 365, 371, 48 S.W. 563, 566 (1898).

133. W. PROSSER, *supra* note 19, § 19, at 110, states that there is "little authority" supporting the minority view, and cites only four states that allow reduction of actual damages. *Id.* at 110 n.31. Presently, reduction of actual damages is the rule in at least three states, *see infra* notes 134-47 and accompanying text; cases allowing such reduction can be found in six additional states, *see infra* notes 148-53. Moreover, four states appear to hedge on the issue. Glenn v. Chenowth, 71 Ariz. 271, 226 P.2d 165 (1951) (suggesting plaintiff's compensatory damages will be reduced if provocation is shown); Minnesota Mining & Mfg. v. Ellington, 92 Ga. App. 24, 27, 87 S.E.2d 665, 667 (1955) (provocation may mitigate damages for assault and battery) (dictum); Baltimore & O. Ry. v. Barger, 80 Md. 23, 32-33, 30 A. 560, 562 (1894) (issue of reduction due to provocation not properly before the court); Ellsworth v. Watkins, 101 N.H. 51, 132 A.2d 136 (1957) (leaving issue open).

134. 365 So. 2d 1212 (Miss. 1978). *See* Twyner, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L. J. 563, 582-84 (1983) (asserting that extension of compara-

held compensatory damages of only $125, although the plaintiff had proved damages of over $9,000. The defendant in *Comer* battered an intoxicated plaintiff while he was trespassing at midnight on the defendant's catfish pond; when the plaintiff motioned to his pocket, the defendant shot him. The court noted that under a Mississippi statute, "the jury was entitled to consider all of these mitigating circumstances and to reduce damages accordingly."[135] With candor rarely seen in intentional tort cases, the court observed that "[m]itigating circumstances are closely akin to contributory negligence,"[136] and reasoned that "since all questions of negligence are for the jury to decide,"[137] it was proper for the jury to consider the plaintiff's contributory fault, even though a battery was alleged.[138]

In *Morneau v. American Oil Co.*,[139] the Supreme Court of Louisiana held that words alone never justify an assault, but instead constitute evidence tending to reduce a plaintiff's recovery.[140] In subsequent cases Louisiana courts have found sufficient provocation to merit reduction of compensatory damages for battery. In *Foster v. Barker*,[141] the plaintiff went to the defendant's apartment at midnight and discovered the plaintiff's girlfriend and the defendant in matching blue pajamas. The plaintiff threatened the defendant, who responded by shooting the plaintiff. Because of the plaintiff's conduct, the trial judge slashed his compensatory award by $9,000.[142]

---

tive fault of intentional torts is consistent with the concept of "pure" comparative fault). Reduction of actual damages has long been allowed in Mississippi. *See* Blanton v. Tri-State Transit Co. of La., Inc., 194 Miss. 393, 398, 12 So. 2d 429, 431 (1943) ("in actions for assault and battery, defendant may show any extenuating circumstances in mitigation of damages").

135. *Comer*, 365 So. 2d at 1214, citing MISS. CODE ANN. § 11-7-61 (1972): "Mitigating circumstances. In actions for libel or slander, assault and battery, and false imprisonment, the defendant, under the plea of not guilty, may give in evidence any mitigating circumstances to reduce the damages, notwithstanding he may also have pleaded a justification."

136. 365 So. 2d at 1214.

137. *Id.* (citing MISS. CODE ANN. § 11-7-17 (1972)).

138. *Id.* The North Carolina Court of Appeals appears also to adopt this approach. Shugar v. Guill, 51 N.C. App. 466, 479, 277 S.E.2d 126, 135, *modified on other grounds*, 304 N.C. 332, 283 S.E.2d 507 (1981) (although provocation is no defense to assault, it can be considered in mitigation of plaintiff's damages). *See also* Lewis v. Fountain, 168 N.C. 277, 84 S.E. 278 (1915); Frazier v. Glascow, 24 N.C. App. 641, 643, 211 S.E.2d 852, 853 (1975).

139. 272 So. 2d 313 (La. 1973). *See* Note, 34 LA. L. REV. 137 (1973).

140. *Morneau*, 272 So. 2d at 315-316.

141. 306 So. 2d 910 (La. Ct. App. 1975).

142. The court reasoned:

> [W]e note that the plaintiff in this suit incurred past medical expenses totaling $1,476.06. Future medical expense of $50.00 is proven. There is testimony to the effect that he lost approximately ten weeks wages, which according to the plaintiff was to the extent of approximately $150.00 per week, plus commissions. We also note that the gunshot wounds, the pain and suffering resulting

The appellate court, noting that the plaintiff "went looking for trouble, and he found it," sustained the trial judge's reduction.[143]

The Louisiana Court of Appeal has upheld reduction of compensatory damages in similar cases: the court has sanctioned reduction of a plaintiff's extensive compensatory damages for battery, because of his provocative acts;[144] affirmed an award of only $250 for pain and suffering, although a plaintiff had spent three weeks in the hospital following a battery;[145] and most recently, reduced by more than $2,500 a plaintiff's compensatory damage award for battery because he had repeatedly chastised the defendant, an "already angry tugboat captain," with "one of the most offensive epithets."[146]

The rule allowing reduction of compensatory damages is also followed in North Carolina.[147] In six additional states—Tennessee,[148] Texas,[149] Pennsylvania,[150] Iowa,[151] New York,[152] and Massa-

---

> from those gunshot wounds, and the additional future hospital medical [expenses] which will be necessary for the removal of the bullet, would also constitute damages for which this Court would normally award the sum of five or six thousand dollars. Future hospital expenses were not, however, proven. While an award for these other items would normally be in order, we believe that the provocation, the verbal abuse and the action of the plaintiff in this case certainly should be held against him in mitigation of the damages. For those reasons we refuse to award the loss of wages in this case and we're going to cut the award for personal injuries down to the sum of $2,500.00.

Id. at 913.

143. *Id.*

144. Watts v. Aetna Casualty & Surety Co., 309 So. 2d 402 (La. Ct. App. 1975). Plaintiff, 55, was given reduced compensatory damages of only $27,000 for his "pain, suffering, permanent brain damage, permanent change of personality, permanent loss of sexual potency, temporary worsening of his heart condition, loss of one month's pay, and loss of past and future earnings as a used car salesman." *Id.* at 406-08.

145. Johnson v. Powell, 338 So. 2d 177 (La. Ct. App. 1976) (barroom fight between two women).

146. Posey v. Fabre, 369 So. 2d 237, 240 (La. Ct. App. 1979). Reaching the same conclusions, see, *e.g.*, DiBenedetto v. Stark, 428 So. 2d 864, 866 (La. Ct. App. 1983); Downey v. Clark, 426 So. 2d 331, 334 (La. Ct. App. 1983); Choate v. Greene, 386 So. 2d 948, 950 (La. Ct. App. 1980); Norrell v. City of Monroe, 375 So. 2d 159, 162 (La. Ct. App. 1979).

147. *See supra* note 138.

148. Jenkins v. Hawkins, 98 Tenn. 545, 41 S.W. 1028 (1897) (allowing reduction of "actual" damages to one cent in wrongful death suit); Arnold v. Wiley, 39 Tenn. App. 391, 284 S.W.2d 296 (1955) (allowing reduction of actual damages below cost of medical bills).

149. Mohler v. Owens, 352 S.W.2d 855, 858-59 (Tex. Civ. App. 1962) (verbal provocation may be shown to mitigate actual and exemplary damages); *see* Note, 41 TEX. L. REV. 124 (1962).

150. Mawhinney v. Holtzhauer, 168 Pa. Super. 283, 287, 77 A.2d 734 (1951) ("Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure.") (affirming the rule of Robison v. Rupert, 23 Pa. 523, 525 (1854)).

151. Bascom v. Hoffman, 199 Iowa 941, 945-46, 203 N.W. 273, 275 (1925) (approving jury instruction allowing reduction of actual damages because of plaintiff's provocation).

152. Kiff v. Youmans, 86 N.Y. 324, 330 (1881) (although plaintiff's provocation cannot justify assault and battery, it may mitigate his compensatory damages) (dictum); Genung v.

chusetts[153]—cases allowing reduction of compensatory damages in self-help cases can be found, although they are less recent and seem not to be followed today.

2. *Nuisance*

Most nuisance cases are based on intentional conduct.[154] According to the *Restatement (Second) of Torts*, intentional nuisance consists simply of continuing existing unreasonable conduct with knowledge that it annoys the plaintiff.[155]

Courts recently have begun to employ comparative fault approaches to intentional nuisance cases. This trend has taken two forms: based on economic and social considerations, equity courts have fashioned novel remedies for intentional nuisance problems;[156]

Baldwin, 77 A.D. 584, 586-87, 79 N.Y.S. 569, 570 (1902) (mitigation of compensatory damages approved to reduce recovery for battery) (following dictum in *Kiff, supra*); Note, 14 FORDHAM L. REV. 95, 97 n.20 (1945). *See also* Decker v. Werbenec, 36 Misc. 2d 220, 221-22, 232 N.Y.S.2d 260, 262-63 (1962) (assault and battery; following dictum in *Kiff, supra*); Winant v. State, 33 Misc. 2d 990, 991, 227 N.Y.S.2d 106, 108 (1962) (abusive language of plaintiff considered in mitigation of damages); Brown v. State, 24 Misc. 2d 358, 365, 205 N.Y.S.2d 73, 80 (1960) (provocative words may be considered in mitigation of damages for battery).

153. Conroy v. Fall River Herald News Co., 306 Mass. 488, 491, 28 N.E.2d 729, 731 (1940) (when plaintiff state senator provoked defendant newspaper to defame him, court properly instructed jury to consider plaintiff's conduct in mitigation of damages); Jackson v. Old Colony St. Ry., 206 Mass. 477, 487, 92 N.E. 725, 728 (1910).

154. Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VIR. L. REV. 1299, 1317 (1977); 40 A.L.R.3d 611 § 3 (1971).

155. RESTATEMENT (SECOND) OF TORTS § 825, comment (d) (1977): "when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional." *See also* W. PROSSER, *supra* note 19, § 8, § 87, at 574 n.32.

156. Although the traditional equitable remedy for nuisance is injunction, courts have imposed that solution only after "balancing the conveniences" of the parties. Note, *Balancing the Equities*, 18 TEX. L. REV. 412 (1940); Annot., 40 A.L.R.3d 611, 616 (1971). Although courts in the past have often refused to engage in balancing in cases in which the defendant acted intentionally (*see, e.g.*, Mobile & O. Ry. v. Zimmern, 206 Ala. 37, 89 So. 475, 16 A.L.R. 1352 (1921); Wright v. Best, 19 Cal. 2d 368, 121 P.2d 702 (1942); Stuart v. Lake Washington, 141 W. Va. 627, 92 S.E.2d 891 (1956)), courts have recently engaged in balancing even in intentional nuisance cases, and have sought imaginative solutions to intentional nuisance problems. *See* Spur Indus., Inc. v. Del Webb Dev., 108 Ariz. 178, 494 P.2d 700, 53 A.L.R.3d 861 (1971) (plaintiff himself at fault must indemnify defendant liable for intentional nuisance in order to acquire desired injunction).

Commentators on nuisance law have been even less respectful of common law rules regarding defendants' intentional conduct. Some economic theorists seem almost to ignore the concept of fault; they propose that the free market should be allowed to determine resolution of nuisance cases. *See generally* Calabrese & Melamed, *Property Rules, Liability Rules, and Alienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Rabin, *supra* note 154.

and of immediate concern to the present inquiry, courts of law have attempted to apply comparative principles to intentional nuisance. The following actions for damages illustrate the struggle of these courts.

In *Sandifer Motors, Inc. v. City of Roeland Park*,[157] the defendants maintained a dump that periodically overflowed into the plaintiff's drainage ravine. The city knew that it was causing continuing problems for the plaintiff.[158] Finally, after a heavy rain, the plaintiff's drainage outlet clogged and overflowed into his warehouse. He sued for intentional nuisance to recover the resulting damages. At trial the defendant proved that the plaintiff had negligently constructed and maintained the outlet. The jury apportioned fault thirty percent to the plaintiff, fifty percent to the defendant, and twenty percent to unknown third persons, and awarded damages accordingly. Although the Kansas Court of Appeals agreed that the parties' conduct merited their sharing liability, the court unfortunately was less than forthright in reaching this result. After stating that comparative fault applied only in nuisance actions grounded in negligence,[159] it then strained to characterize the defendant's obviously intentional conduct as negligence in order to allow comparison.[160]

---

157. 6 Kan. App. 2d 308, 628 P.2d 239 (1981).

158. The plaintiff had previously sued the city over similar occurrences. *Id.* at 318-19, 628 P.2d at 248. The first suit was settled (and the plaintiff executed a covenant not to sue on those original events) prior the the action in question, and the parties consented to a motion in limine to prevent introduction of evidence relating to those events. At trial the city attempted to claim it did not know of the plaintiff's continuing problem with the dump. The trial court allowed the plaintiff to produce evidence (not protected by the motion) that the city mayor actually knew a lawsuit had been filed and settled. The court of appeal upheld introduction of this evidence. *Id.* at 319-20, 628 P.2d at 248-49. Thus, there was proof the city knew that its continued conduct created a nuisance.

159. *Id.* at 317-18, 628 P.2d at 247-48.

160. The court accepted the definition of intent given in the *Restatement*:

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
>
> (a) acts for the purpose of causing it, or
>
> (b) knows that it is resulting or is substantially certain to result from his conduct.

Id. at 318-19, 628 P.2d at 248 (quoting RESTATEMENT (SECOND) OF TORTS § 825, at 117 (1965)).

Although the facts of the case showed that the defendant city knew it was interfering with the plaintiff's land, the court maintained that the city's action was not intentional:

> This case involves a specific incident stemming from a condition apparently existing for a number of years prior to the injury. There had been some isolated instances of trouble in prior years—even, as will be discussed later, to the point of provoking a lawsuit. However, there was apparently nothing of the magnitude of this incident, and no evidence was introduced of any trouble before 1975. The jury heard only of heavy rains earlier in 1975 which had caused

In *Melendres v. Soales*,[161] the Michigan Court of Appeal faced the same dilemma but declined to take the *Sandifer* "recharacterization" approach. The court recognized that the defendant, who "felt it unnecessary" to post warning signs in shallow recreational lake water into which patrons often dove, had thereby created an intentional nuisance.[162] The plaintiff negligently dove into the murky shallow waters and suffered severe injuries. The court held that the plaintiff's conduct could not be compared with that of the defendant, because the defendant acted intentionally. Wincing at this result, the court suggested that fairness required comparison in such cases, but deferred instead to mechanical application of precedent, and allowed the plaintiff full recovery.[163]

In *Furrer v. Talent Irrigation Dist.*,[164] the plaintiff sued to recover damages for the death of over 165 pear trees. The defendant

---

> plaintiff concern, but no serious difficulties. *Although the city may have known of the plaintiff's continuing concern*, it was not until plaintiff's drainage system clogged and ruptured, presumably as a result of the combination of trash and debris washing down the ravine and the improper design of the system itself, that serious damage occurred. The fact that the city contributed by its dumping is not sufficient to charge it with intentional wrongdoing. Along with other unnamed parties, the city simply dumped where it should not have. There is nothing to indicate it intended to damage the plaintiff, or that the injury was substantially certain to occur. At best, the evidence showed only that the city's conduct created a condition posing an undue risk of harm. Accordingly, it was proper for the jury as fact finder to allocate causal responsibility for plaintiff's damages.

Id. (emphasis added and deleted). But the court missed the point. The facts showed the defendant city *knew* that a nuisance would result from its conduct. *See supra* note 158. Nothing more need be shown to establish intentional nuisance.

Still, the *Sandifer* court is on the right track. It recognized that the conduct of the parties should be compared, even though according to accepted definitions, the defendant acted intentionally. The court was understandably reluctant to allow the plaintiff, who was also at fault, to recover fully. But it is unfortunate that a court need engage in dishonest and contorted factual and legal analysis in order to achieve socially desirable results. Instead, the court might have openly and candidly acknowledged the extension of comparative fault principles to non-self-help intentional nuisance actions.

161. 105 Mich. App. 73, 306 N.W.2d 399 (1981).

162. *Id.* at 81, 306 N.W.2d at 403. The court noted that this conclusion was mandated under the Michigan Supreme Court's definition of intentional nuisance as enunciated in Gerzeski v. Department of State Highways, 403 Mich. 149, 161-62, 268 N.W.2d 525, 529 (1978).

163. In this case, we reach a result which we believe is mandated by Supreme Court precedent. At the same time, on the facts of this case, we think it inequitable that if the jury on retrial finds an intentionally created nuisance . . . as that term is defined [by the state supreme court], that defendants cannot interpose as a defense, possibly reducing their liability, plaintiff's negligent conduct.

105 Mich. App. 73, 84, 306 N.W.2d 399, 404-05.

164. 258 Or. 494, 466 P.2d 605 (1970).

irrigation district had opened a small canal next to the plaintiff's orchard. The plaintiff noticed that the water table on his property grew higher after the canal was opened and he was aware that a high water table would, in time, drown the feeder roots of his trees and permanently injure them. Still, in the ensuing years, he increased the irrigation of his property. The Supreme Court of Oregon found that the defendant irrigation district knew or had reason to know its water was seeping into the plaintiff's land. The court concluded that an intentional nuisance or trespass had occurred. Noting that contributory negligence (which was at the time applicable) did not apply in intentional tort actions, the court nevertheless applied the rule of "avoidable consequences" to uphold jury instructions allowing reduction of the plaintiff's recovery.[165] It seems, however, that in its haste to reach an equitable solution that accounted for the plaintiff's conduct, the Oregon court reached an appropriate result by questionable means. The "avoidable consequences" concept is an exception to contributory negligence; the doctrine seeks to isolate separate causation and apportion damages accordingly. Although appealing on a theoretical level, in practice it is often impossible to apportion causes unless the circumstances allow a logical division to be made between component events.[166] It seems highly unlikely that the *Furrer* court could state whether it was the water applied by the plaintiff or the water allowed to seep by the defendant that killed a given tree. Instead it seems that the court applied a comparative fault test to the intentional nuisance and awarded to the plaintiff that percentage of the total damages allocable to the defendant's fault. Extension of comparative fault to intentional nuisance torts would clarify and legitimize this result by obviating the need for courts to engage in questionable legal craftmanship in order to accomplish indirectly that which could be directly attained through explicit application of comparative fault.

* * *

Clearly, courts have struggled to apply comparative fault principles to intentional torts. Unfortunately, some courts have employed comparative fault in cases characterized by self-help, and others have

165. *Id.* at 512-16, 466 P.2d at 614-16.

166. W. PROSSER, *supra* note 19, § 67, at 423 n.68. The court's approach also ignores the fundamental difference between comparative fault and comparative causation. *See supra* note 95. The Oregon court followed *Furrer* in Reter v. Talent Irrigation Dist., 258 Or. 140, 482 P.2d 170 (1971).

declined to expressly apply comparative fault in intentional nuisance cases not characterized by self-help. In doing so, the battery cases have reached antisocial results, in that they seem to sanction self-help; and the nuisance cases, by mechanical adherence to precedent, have stretched to reach equitable results through strained legal reasoning.

V. Implementing Comparative Fault Principles in Appropriate Intentional Nuisance Torts

As shown above, there exist substantial social policy reasons as well as a solid theoretical foundation in favor of applying comparative fault to appropriate intentional nuisance actions not reflecting self-help. Policy goals to be furthered by extension of comparative principles include consistent analysis of tort actions, and equitable allocation of loss among all parties whose faulty conduct has proximately caused damages. On the other hand, policy considerations of deterrence and punishment of the defendant, which militate against extension of comparative principles to self-help intentional torts, are of questionable relevance to intentional nuisance situations, which by their nature typically do not reflect the same degree of social opprobrium that attaches to self-help conduct. In any event, deterrence and punishment of intentional nuisance tortfeasors would still be available through imposition of punitive damages.

We have also seen that comparative fault can be applied to non-self-help intentional torts consistently with the continuum theory of fault presented earlier. Although courts in extending comparative principles to strict tort liability actions have gone so far as to allow comparison of conduct truly dissimilar (fault compared with no-fault), we do not need to venture so far in order to extend comparative principles to appropriate intentional tort cases. As discussed above, fault can be viewed as a continuum of conduct ranging from objective negligence to subjective intent. Some courts have by implication already rejected the notion that a fictional "difference in kind" precludes comparison of the three traditional classifications of conduct. These courts have allowed comparison of plaintiffs' negligent conduct and defendants' reckless conduct. In regard to theoretical consistency the logical next step is to recognize that intentional as well as reckless conduct is subject to comparative fault analysis.

A. *Application of Comparative Fault Statutes*

Several states have adopted comparative negligence by statute.

In current form many of these comparative negligence laws would accommodate application of comparative fault principles to intentional nuisance situations. Maine's statute, for example, calls for comparison and reduction of damages "[w]here any person suffers death or damage as a result partly of his own fault and partly of the fault of any other person or persons."[167] The statute continues, "[f]ault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort."[168] Arkansas' statute contains a similarly broad definition of fault: "[t]he word 'fault' as used in this Act . . . includes any act, omission, conduct, risk assumed, breach of warranty or breach of legal duty which is a proximate cause of any damages by any party."[169] The statutes of Louisiana,[170] New York,[171] Oregon,[172] California,[173] Puerto Rico,[174] and Rhode Island[175] are also broad enough to allow comparison in appropriate intentional torts. Even jurisdictions that by decision or by statute appear to apply contributory fault only to negligence cases would have little difficulty allowing comparison in appropriate intentional torts, considering the ease with which those jurisdictions have extended comparison to strict tort liability actions.[176] The

---

167. ME. REV. STAT. ANN. tit. 14 § 156 (1980) (plaintiff may recover only if he is less at fault than defendant).

168. *Id.*

169. ARK. STAT. ANN. §§ 27-1763 to -1765 (1979). Like the Maine statute, Arkansas allows recovery only when plaintiff is less at fault than defendant.

170. LA. CIV. CODE ANN. art. 2323 (West Supp. 1983) (allowing comparison when damage is the result "partly of [plaintiff's] own negligence and partly as a result of the fault of another person or persons").

171. N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976) (allowing comparison of the "culpable conduct" of plaintiff and defendant).

172. OR. REV. STAT. § 18.470 (1979) (plaintiff may recover if his "fault" is less than the "fault" of defendant). The statute includes a caveat: "[t]his section is not intended to create or abolish any defense."

173. When California judicially adopted comparative negligence in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), the court relied on a century-old statute liberal enough to embrace intentional torts:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

CAL. CIV. CODE § 1714(a) (West Supp. 1984).

174. P.R. LAWS ANN. tit. 31 § 5141 (1968) (calling for reduction of damages for "fault or negligence").

175. R.I. GEN. LAWS § 9-20-4 (Supp. 1982) (plaintiff's recovery is diminished in proportion to his negligence; statute fails to mention defendant).

176. Alaska, in Kaatz v. State, 540 P.2d 1037 (Alaska 1975) and California, in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), adopted comparative fault specifically in negligence cases. In *Li*, the court took pains to revise an earlier draft of

courts have traditionally been activist in the area of torts;[177] evolution in the past decades of products liability law and comparative negligence law indicate that a willing court would be fully capable and competent to fashion appropriate rules governing comparative fault in non-self-help intentional torts.

VI. CONCLUSION

The admiralty courts first articulated the notion that a party's intentional conduct barred apportionment or division of damages. The reason for the rule was simple and pragmatic; the courts sought merely to prevent parties from abusing the old rule of division of loss, which guaranteed each ship owner half damages after a collision.

The early common law courts, apparently uncomfortable with the idea of allowing juries to determine relative fault, rejected the idea of apportioning damages, and instead employed contributory negligence to bar from recovery plaintiffs who were at fault. These courts, however, found it necessary to develop numerous ameliorative fictions to mitigate the harsh effect of the contributory negligence bar. Chief among these was the rule that a plaintiff's negligent conduct would not bar his recovery in intentional tort. Given that the alternative was to bar completely a plaintiff's recovery, this made sense. But now that contributory negligence does not apply in the

---

the opinion that called for apportionment of damages based on percentage of "causal responsibility." The final draft speaks of apportioning damages based on "fault," defined as "negligence in the accepted legal sense." *Id.* at 816 n.6a, 532 P.2d at 1232 n.6a, 119 Cal. Rptr. at 864 n.6a. *See* Schwartz, *supra* note 24 at 756. But such seemingly restrictive language has stopped neither the California nor the Alaska Supreme Courts from extending comparative fault principles to strict liability actions. Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (products liability); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Butaund v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976) (products liability). Florida, which adopted comparative fault in negligence cases in Hoffman v. Jones, 280 So. 2d 431, 78 A.L.R.3d 321 (Fla. 1973), extended comparative principles to strict liability actions in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

Other states have also extended comparison to strict liability, though their respective comparative fault statutes seem to confine comparison to negligence cases. *E.g.*, Busch v. Busch Const., Inc., 262 N.W.2d 377 (Minn. 1977) (statute later amended to include strict liability actions, MINN. STAT. ANN. §§ 604.01-.04 (West Supp. 1983) (implicitly excluding intentional conduct in definition of fault)). In a case applying Mississippi law, a federal court of appeals invoked comparative fault in strict liability. Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1976) (interpreting MISS CODE ANN. § 11-7-17 (1972) (statute appears merely to abrogate contributory negligence)). *See also* Toyota Motor Co. v. Sanford, 375 So. 2d 1036, 1038 (Miss. 1979) (approving *Edwards* in dictum).

177. *See* Bischoff, *The Dynamics of Tort Law: Court or Legislature?*, 4 VER. L. REV. 35 *passim* (1979).

majority of jurisdictions, further adherence to the practice of ignoring a plaintiff's conduct when an intentional tort is alleged cannot continue to be justified as an avoidance of the contributory negligence bar. Instead, the justification must rest, if at all, either on the theory that legal symmetry forbids comparison of conduct thought to be different in kind, or on the basis that application of comparative fault in intentional torts would violate social policy.

This article has asserted that intentional, reckless and negligent conduct are not different in kind, but merely reflect different degrees of violation of a common social norm. Surely, policy considerations militate against creating the appearance of sanctioning or facilitating self-help by intentional tortfeasors by allowing them to employ comparative fault principles to reduce a plaintiff's recovery. Courts that recently have applied comparative fault to intentional battery cases seem to violate social policy in this regard. But the policy considerations against sanctioning self-help are less applicable to cases of intentional nuisance, which reflect not self-help, but mere willingness to allow existing norm-violating conditions to continue. Indeed, the policy of achieving full consideration of all parties' liability in proportion to their fault militates in favor of extending comparative principles to appropriate intentional nuisance cases.

To effect this same policy, courts have begun to extend comparative fault to recklessness and strict liability actions. Other courts have recently struggled with intentional nuisance cases in order to produce equitable results within the framework of existing precedent. Although the results reached in the latter group of cases may sometimes seem proper, these opinions contribute only confusion to an area of the law in which court decisions reflect most clearly the conflict between legal fiction and just results.

Courts should openly recognize that the asserted "different in kind" theory poses no theoretical obstacle to comparison of intentional, reckless, and negligent conduct. The cases over the past century and a half suggest that the real test for application of comparative fault in intentional torts should be one of social policy not fictional theoretical symmetry. With recent exception in some southern states, courts deciding intentional tort cases have declined both to apply the contributory negligence bar, or to invoke comparative fault, in order to avoid sanctioning self-help measures by defendants. Although that policy consideration counsels against application of comparative fault in true self-help intentional torts, the same consideration may often be absent in other intentional tort actions, such as nuisance. In those cases courts should reevaluate precedents inconsis-

tent with the real policy considerations behind the application of comparative fault to intentional torts.